CERTIFICATE.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1908.

No. 416.

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THE DELAWARE AND HUDSON COMPANY

vs.

THE ALBANY AND SUSQUEHANNA RAILROAD COMPANY ET AL.

ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

FILED MAY 25, 1908.

(21,199.)

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1 *Certification of Question to Supreme Court.*

United States Circuit Court of Appeals, Second Circuit.

Before Lacombe, Ward and Noyes, Circuit Judges.

AETNA INSURANCE COMPANY and Twelve Others, Complainants-Appellees,

vs.

THE ALBANY & SUSQUEHANNA RAILROAD COMPANY, Defendant-Appellee, and THE DELAWARE AND HUDSON COMPANY, Defendant-Appellant.

This cause comes here upon appeal from a final decree of the Circuit Court Southern District of New York which directs that the defendant Delaware and Hudson Company (hereinafter called the Delaware Co.) pay to the defendant the Albany and Susquehanna Railroad Company, (hereinafter called the Susquehanna Co.) the amount of $1,107,923.24.

The case was fully argued and submitted on briefs. It thereupon developed that there was a question presented whether the bill could be maintained under the 94th Equity Rule. That question is a preliminary one, it has been held to be jurisdictional in character (City of Chicago *vs.* Mills, 204 U. S., 321; Doctor *vs.* Harrington, 196 U. S., 579) and this court desires the instruction of the Supreme Court for its proper decision.

2 *Statement of Facts.*

The facts upon which the question arises are as follows:

The defendant corporations are both citizens of the State of New York; the complainants are citizens of the States of Connecticut and Rhode Island. The bill was brought to obtain an accounting for various sums of money, which it was alleged became due at intervals during a series of years from the Delaware Company to the Susquehanna Company as rental or in the nature of rental under a lease made in 1870. For the convenience of all a copy of the pleadings is hereto annexed marked Exhibit "A" which may be referred to for a more detailed statement of the cause of action. The bill does not "set forth with particularity the efforts of the plaintiffs to secure such action as they desire on the part of the managing directors or trustees." Nor did the proofs show any such efforts. Nor does the bill set forth any efforts to secure "such action on the part of the shareholders." Nor did the proofs show any such efforts. Nor did the bill set forth, or the proofs show, "the causes of their failure to obtain such action" otherwise than is hereinafter disclosed.

The complaint was filed on June 12, 1906. The Susquehanna Company was organized under the Act of April 2, 1850, which

provides that "there shall be a board of thirteen directors * * * to manage its affairs" and for many years before this suit was brought a majority of the Board of Directors of the Susquehanna Company consisted of persons who were officers, directors or employees of the Delaware Company. At the time this suit was instituted, the directors and officers of the Susquehanna Com-
3 pany, the dates of their election as such, and their relations to the Delaware Company with dates of election were as shown on the following statement:

Names of directors of Susquehanna Company and dates of election as directors and officers.	Position in Delaware and Hudson Company and dates.
Robert M. Olyphant, 1878	Director since 1872 President from 1884 to 1903 Chairman of the Board since 1903.
George I. Wilber, 1883	Director since 1901
David Willcox, 1894 (Vice President, May 9, 1906)	General Counsel 1894 to 1903 Director since 1899 President since 1903
R. Suydam Grant, 1901	Director since 1886
Charles A. Peabody, 1902	Director since 1902
William S. Opdyke, 1903	General Counsel since 1903 Director since 1905.
Abel I. Culver, 1903	A Vice President since 1903.
Charles A. Walker, 1892	Treasurer 1892
Robert Olyphant, 1887 (President since 1889)	Son of Robert M. Olyphant
William L. M. Phelps, 1873 (Secretary since 1870)	Secretary of the Albany and Susquehanna Company, elected by the Board of Directors.
Robert C. Pruyn, 1890	Nominees of the Delaware Company as stated in the Delaware Company's answer.
James H. Manning, 1890	

Of these Robert M. Olyphant, R. Suydam Grant, Charles A. Peabody, William S. Opdyke, Abel I. Culver and Robert C. Pruyn at the time this suit was begun did not own or hold in their own right any shares of stock in the Susquehanna Company, but shares
4 of stock of that company owned by the Delaware Company were transferred to each of them on the books of the Susquehanna Company by the Delaware Company for the purpose of qualifying them as such directors. Charles A. Walker owned five shares of Susquehanna stock from 1901 to 1906; it does not appear that he owned any stock in the Susquehanna Company during the year 1906.

So far as appears from anything shown in this record none of the directors or officers of the Delaware Company ever, before or after the bringing of this suit, treated the claim therein set forth otherwise than as one of doubtful validity the payment of which was to be resisted.

On June 12, 1906, and for thirty years prior thereto, the capital stock of the Susquehanna Company had been fixed at and limited to 35,000 shares. Of this capital stock on June 12th, 1906, the Delaware Company owned 4500 shares and its directors or officers owned or controlled 4340 shares; the complainants owned 1312 shares and a so-called Protective Committee who from and after December 1905, had been opposing the administration of the Delaware Company upon the questions involved in this bill controlled 6688 shares. The entire 35,000 shares were held by 546 different persons, of whom 423 owned 50 shares or less, and of whom 383 resided in the State of New York.

An annual meeting of the Susquehanna Co. was held subsequent to the beginning of this suit, on October 16, 1906. At that meeting the nominees of the Protective Committee were elected, receiving 15,501 ballots, the nominees of the former management receiving 15,441 ballots. About two weeks before such annual meeting the Susquehanna Company being then controlled by the directorate above named, filed a demurrer to the bill which is hereto
5 annexed as Exhibit "B". Copies of such demurrer were sent by stockholders opposed to the existing control to all stockholders and thereafter and before the meeting proxies for several thousand shares were received by the persons who voted for the nominees then elected.

Questions Certified.

Upon the facts above set forth the questions of law concerning which this court desires the instruction of the Supreme Court are:

First. "Does the fact that before institution of this suit complainants made no demand for relief upon the Board of Directors of the Susquehanna Company prevent them from maintaining this bill?"

Second. "Does the fact that before institution of this suit complainants made no effort to obtain relief at a stockholders' meeting prevent them from maintaining this bill?"

In accordance with the provisions of Sec. 6 of the Act of March 31, 1891, the foregoing questions of law are, by the Circuit Court of Appeals for the Second Circuit, hereby certified to the Supreme Court.

E. HENRY LACOMBE,
H. G. WARD,
WALTER C. NOYES,
Circuit Judges.

6 United States Circuit Court of Appeals for the Second Circuit.

I, William Parkin, Clerk of the United States Circuit Court of Appeals for the Second Circuit,

Do Hereby Certify that the foregoing certificate was filed and entered of record in my office on the 22nd day of May, 1908, and

by direction of the Judges of said Court, said certificate is forwarded to the Supreme Court of the United States.

Dated New York May 23, 1908.

[Seal United States Circuit Court of Appeals, Second Circuit.]

WM. PARKIN,
Clerk of the United States Circuit Court of Appeals for the Second Circuit.

7 EXHIBIT "A."

Bill of Complaint.

Circuit Court of the United States, Southern District of New York.
In Chancery.

AETNA INSURANCE COMPANY ET AL., Complainants,
against
ALBANY & SUSQUEHANNA RAILROAD COMPANY and DELAWARE & HUDSON COMPANY, Defendants.

To the Judges of said Circuit Court, in Chancery Sitting:

Your orators, Aetna Insurance Company; Connecticut Trust & Safe Deposit Company, trustee as hereinafter stated, and Security Company, trustee as hereinafter stated each of said complainants being a corporation organized and existing under and by virtue of the laws of the State of Connecticut, and having its principal office in the City of Hartford, in said State of Connecticut; Atwood Collins, executor under the last will and testament of Erastus Collins, deceased; Francis R. Cooley, Charles P. Cooley and Melancthon W. Jacobus, executors under the last will and testament of Francis B. Cooley, deceased; Jonathan B. Bunce, Drayton Hillyer and Archibald A. Welch, trustees as hereinafter stated; John R. Redfield, trustee as hereinafter stated; Atwood Collins and John R. Redfield, trustees as hereinafter stated; John D. Browne, Lucius A.
8 Barbour and Francis Parsons, trustees as hereinafter stated; Mary Danesi and Fanny M. Barclay, each and every one of said complainants being a citizen of the State of Connecticut and residents of the City of Hartford in said State;

Rhode Island Hospital Trust Company, a corporation organized and existing under and by virtue of the laws of the state of Rhode Island and having its principal office in the city of Providence in said state, trustee as hereinafter stated; Howard O. Sturges, William L. Hodgman and Herbert J. Wells, trustees under the Will of Benjamin B. Knight, deceased, Mr. Sturges and Mr. Hodgman being residents of the town of Warwick in the State of Rhode Island and Mr. Wells being a resident of the town of South Kingston in the state of Rhode Island, each and every one of said complainants being a citizen of the state of Rhode Island, bring this their bill of complaint on behalf of themselves and of all other stockholders in the Albany & Susquehanna Railroad Company and of all other

creditors of the Delaware & Hudson Company similarly situated who may join herein and contribute to the expense of this proceeding against the Delaware & Hudson Company (hereinafter called the Delaware Company) a corporation organized and existing under the laws of the state of New York and having its principal office in the city of New York, in the Southern District of said state, and the Albany & Susquehanna Railroad Company (hereinafter called the Susquehanna Company), a corporation organized and existing under the laws of the state of New York, and both of said defendant corporations being citizens of said state of New York.

And thereupon your orators complain and say—that the above named complainant Ætna Insurance Company owns and continuously for over thirty-four years last past has owned five hundred shares of the capital stock of the defendant Susquehanna Company; that the above named complainant Connecticut Trust & Safe Deposit company owns and continuously for over sixteen years last
9 past has owned twenty-one shares in said defendant Susquehanna Company as trustee for Charlotte G. Beckwith Cook, formerly known as Charlotte G. Beckwith; and also that it owns and continuously for over eleven years last past has owned forty shares of stock in said Susquehanna Company as trustee for Richard L. Beckwith; and also that it owns and continuously for over sixteen years last past has owned twenty-one shares of stock in said Susquehanna Company as trustee under the last will and testament of Horatio Alden, deceased; that the above named complainant Security Company owns and continuously for more than fourteen years last past has owned eighty shares of stock in said defendant Susquehanna Company as trustee under the last Will and Testament of Joseph Trumbull; that said Security Company further owns and continuously for more than seventeen years last past has owned fifty shares of stock in said defendant Susquehanna Company as trustee under the last Will and Testament of John A. Taintor, deceased; that the above named complainant Atwood Collins, as executor of the last will and testament of Erastus Collins, deceased, owns one hundred shares of stock in said defendant Susquehanna Company, and that the said shares have been the property of the said decedent and of the said Atwood Collins as his executor continuously for more than twenty years last past; that the above named Francis R. Cooley, Charles P. Cooley and Melancthon W. Jacobus, as executors of the last Will and Testament of Francis B. Cooley, deceased, own one hundred shares of stock in said defendant Susquehanna Company, and that the said shares have been the property of the said decedent and of his said executors continuously for over eighteen years last past; that the above named Jonathan B. Bunce, Drayton Hillyer and Archibald A. Welch own and continuously for more than thirty-three years last past have owned one hundred shares of stock in said defendant Susquehanna Company, as trustees under the last Will and Testament of Ira Peck, deceased; that the above mentioned complainant John R. Redfield owns and continuously for
10 more than thirty years last past has owned twenty-five shares of stock in said defendant Susquehanna Company as trus-

tee under the last will and testament of George S. Howe; that said John R. Redfield further owns and continuously for more than thirty years last past has owned twenty-five shares of stock in said defendant Susquehanna Company as trustee under the last Will and Testament of E. G. Howe, deceased; that the above named Atwood Collins and John R. Redfield, surviving trustees under the Will of E. H. Perkins, deceased, own forty-one shares of stock in said defendant Susquehanna Company, and that the said shares have been the property of the said decedent and of the said trustees under his last Will and Testament continuously for more than twenty-five years last past; that the said John D. Browne, Lucius A. Barbour and Francis Parsons, as trustees under the last Will and Testament of Calvin Day, deceased, own five shares of stock in said defendant Susquehanna Company, and that the said shares have been the property of the said decedent and of the trustees under his Will continuously for more than fourteen years last past; that the above named complainant Mary Danesi owns and continuously for more than five years last past has owned fifty shares of stock in said defendant Susquehanna Company; that the above named complainant Fanny M. Barclay owns and continuously for more than ten years past has owned six shares of stock in said defendant Susquehanna Company; that the above named complainant Rhode Island Hospital Trust Company as trustee under the last Will and Testament of William L. Beckwith, deceased, owns seventy-four shares of stock in said defendant Susquehanna Company, and that the said shares have been the property of the said decedent and of the trustee under his said Will continuously for more than eighteen years last past; that the above named complainants Howard O. Sturges, William L. Hodgman and Herbert J. Wells, as trustees under the last Will and testament of Benjamin B. Knight, deceased, own seventy-four shares of stock in said defendant Susquehanna Company, and that the said shares have been the property of the said decedent and of the trustees under the said Will continuously for six years last past.

11

And your orators show to the court that the defendant Delaware Company has endorsed and guaranteed to each of your orators certain payments upon the shares of stock so held by them respectively as hereinafter and in the lease and agreement hereto attached is stated.

That the defendant Susquehanna Railroad Company was organized in or about the year 1851 under and pursuant to the Act of the Legislature of the State of New York entitled "An Act to authorize the formation of Railroad Corporations and to regulate the same" passed April 2, 1850 the purpose for which the said corporation was formed being to construct, maintain and operate a railroad for public use from a point on the line of the New York and Erie Rail Road at or near to the Village of Binghamton, in the County of Broome, to the City of Albany, in the State of New York, through the Valley of the Susquehanna; that the term of said corporation was by the articles of association fixed at one hundred and fifty years; that the capital stock of said defendant was by its charter

fixed at $1,400,000 with the right to increase the said stock pursuant to the provisions of the Act before referred to, and that the authorized amount of capital stock was increased and by the Act of the Legislature of said State of New York passed April 16, 1859, fixed at the sum of $4,000,000, but that as hereinafter stated part only of the capital stock so authorized has been issued.

That the said defendant after its organization entered upon the construction of its railroad between the points mentioned, and that the said railroad was thereafter completed, equipped and operated by said Albany & Susquehanna Rail Road Company; that to raise money for the purposes aforesaid the defendant Railroad Company from time to time made its several mortgages, as follows:

12 On or about the 1st day of July, 1863, the said Susquehanna Company made its mortgage securing bonds to the principal amount of $1,000,000, payable twenty-five years after date and bearing interest at the rate of 7% per annum.

On the 10th day of April, 1852, the Legislature of the State of New York authorized the City of Albany to issue bonds to the amount of $1,000,000 and to loan the same to the Albany & Susquehanna Rail Road Company; said bonds to bear interest at 6% per annum, payable semi-annually, and the principal to be payable at the expiration of thirty years from the date of issue, the Susquehanna Company to pay the interest thereon at the rate aforesaid; also to pay 1% a year to the Trustees of the Sinking Fund of the City of Albany and all premiums which might be received from the sale of said bonds, the payments so made to constitute a sinking fund for the ultimate payment of the bonds of the City of Albany so issued and loaned, and the obligations of the Company in reference to said bonds to be secured by a mortgage to the Mayor, Aldermen and Commonalty of the City of Albany.

That on or about the first day of November, 1865, said Susquehanna Company made, executed and delivered its mortgage as in said act provided, and to the said mortgage and to the provisions thereof and its agreements for payment to the Trustees of said Sinking Fund, your orators expressly refer; that the bonds which the City of Albany was authorized to issue were in fact issued and delivered to the said Susquehanna Company, and that in accordance with the provisions of said Act and of the mortgage given thereunder, and of the mortgage dated July 1, 1863, the lien of both mortgages was equal, and that both mortgages together were commonly described as said defendant's first mortgage.

That on or about the 1st day of October, 1865, the said Susquehanna Company issued its mortgage known as its second mortgage securing bonds to the amount of $2,000,000 bearing interest at the rate of 7% per annum and on May 1, 1869, issued its third

13 mortgage securing bonds to the amount of $500,000 bearing interest at the rate aforesaid: and that on the first day of February, 1870, the mortgages of the defendant company secured bonds issued or to be issued to the amount of $4,500,000 as above stated, and that the capital stock of said defendant lawfully issued and at that time legally outstanding amounted to about $2,500,000.

That the defendant, Delaware Company, then known by the corporate name of the President, Managers and Company of the Delaware & Hudson Canal Company, being desirous of leasing the railroad and railroad property of the defendant Susquehanna Company on or about the twenty-fourth day of February, 1870, made and entered into a written agreement with the Susquehanna Company wherein and whereby the Susquehanna Company leased to said Delaware Company for and during the full end and term of the said lessor's charter and every renewal and continuance thereof, its railroad and railroad property and the said Delaware Company agreed to pay therefor a certain rent which until the first day of January, 1871, should be paid at the rate therein fixed and which on and after the first day of January, 1871, was in said lease fixed at the yearly sum of $490,000; that the Susquehanna Company in said lease was designated as the party of the first part, the Delaware Company was designated as the party of the second part, and that in and by the said lease it was agreed that the rental should be payable in the way and manner and at the times which in said lease were stated in the words and figures as follows:

"And the said party of the second part, in consideration of the demise, covenants and agreements herein contained, and to be performed, fulfilled and kept on the part of the party of the first part, its successors and assigns, hereby covenants and agrees that it will pay as and for the annual rent aforesaid semi-annually, the interest accruing and to become due and payable from and after the
14 date of these presents, upon one million of dollars at six per cent. Albany city bonds, issued to the party of the first part under and by virtue of an Act of the Legislature of this State, entitled 'An Act to authorize the City of Albany to make a loan to the Albany & Susquehanna Railroad Company,' passed April 10, 1852, together with one per cent. thereon to the sinking fund, as mentioned and referred to in the aforesaid Act, and will also pay, semi-annually, three and one-half per cent. for the interest accruing from and to become due and payable after the date of these presents, upon three and a half millions of dollars of certain mortgage bonds made and executed by the party of the first part, upon the aforesaid railroad property and effects, according to the terms and conditions thereof, and will also pay to the party of the first part, in equal monthly installments, from the date of these presents until the first day of January, one thousand eight hundred and seventy-one, at the rate of one hundred and forty thousand dollars per annum, and will also, from and after the first day of January, one thousand eight hundred and seventy-one, upon the first days of July and January in each year, pay a semi-annual dividend of three and one-half per cent. upon the then existing shares of the capital stock of the said party of the first part, not exceeding twenty-five thousand shares, and if so many shares do not exist at the time of any such payment, or if the sum required for the payments before mentioned, shall not amount to the aforesaid four hundred and ninety thousand dollars, the balance not applied to the payment of such interest and dividends shall be paid to the said party of the

first part. It being understood, however, that the interest and dividends to be paid as aforesaid shall and may be paid directly to the respective bond and stockholders."

Your orators further show that in and by said lease it was
15 further covenanted that in case the second party should at any time thereafter desire to enlarge the capacity of the railroad by building a double track, extending the length thereof or otherwise, then, and in every such case, the party of the first part should as therein provided issue additional stock or bonds, the amount thereof to be so limited that the liabilities of the Susquehanna Company in stock and bonds should never exceed $15,000,000 and the lessee to pay to the holders of all such additional bonds or stock so issued interest or dividends thereon at the rate of 7% per annum in equal semi-annual payments.

Your orators therefor- show to the Court that the lessee in and by said lease agreed to pay for the demised property as it then stood, annual rental as follows:

Interest on $3,500,000 mortgage Bonds	$245,000.
Dividends on stock (not exceeding $2,500,000 par value)	175,000.
Interest on Albany loan at 6%	60,000.
Sinking Fund for Albany loan 1% annually	10,000.
	$490,000.

And further for all additions and enlargements which might be made to said property the lessee assumed to pay in addition to its rent above stated interest or dividends at the rate of seven per cent. upon the amount of all new securities which under the provisions of the lease should be issued therefor by the Susquehanna Company, for additions or enlargements.

And your orators show that the covenant in said lease contained to the effect that the said lessee should pay directly to the stockholders of the said Susquehanna Company, a portion of the rent accruing under said lease, was made for the benefit of said stockholders; that the said Delaware & Hudson Company in and by said lease agreed to endorse upon the certificates belonging to stockholders in said Susquehanna Company its guaranty of such payments according to the terms under its corporate seal; that the defendant
16 Delaware Company did in fact so guarantee such payments to stockholders and as your orators are informed and believe said defendant Delaware Company has since that time made its payments directly to stockholders.

And your orators show that said lessee further covenanted that if the sum required for the payment of the minimum rental of $490,000 should not amount to said sum the balance not applied to the payment of interest and dividends should be paid to the Susquehanna Company and that your orators are advised that upon a proper construction of said lease the provisions thereof forbid sums paid as interest or dividends upon securities issued for additions and enlargements should be credited upon said minimum rental of $490,000, but were by said lease to be paid in addition thereto.

Your orators further show, that, as hereinafter will more fully and at large appear, the defendant Delaware Company has failed to pay the said minimum rental of $490,000 in that

1. The mortgage bonds bearing seven per cent. interest were retired at some time unknown to your orators but as your orators are informed and believe prior to the year 1885 by bonds bearing six per cent., and that thereafter the said Delaware Company should have paid the amount which it was so relieved of paying as interest upon said bonds directly to the Susquehanna Company, for its stockholders;

2. That said six per cent. bonds were in the month of April 1906 retired by the issue of bonds bearing 3½ per cent. and that thereafter the Delaware Company should pay to the Susquehanna Company for its stockholders the further amount which it is relieved from paying as interest upon Susquehanna bonds.

3. That the defendant Delaware Company upon payment of said Albany loan failed to pay the amount designated for the service thereof during its existence as in said lease provided, but retained the same to its use.

17 Your orators show that the defendant Delaware Company insists that it has the right to credit all sums paid under said lease upon said minimum rental, but your orators show that in and by said lease a distinction was made with regard to interest on then existing bonds and bonds thereafter to be issued, the lessee agreeing as to then existing bonds to pay as interest the annual sum of $245,000 or if so much were not required to pay the balance to the Susquehanna Company; while as to bonds thereafter to be issued it was covenanted only that the lessee should pay the interest upon such limited amount as the lessor upon its demand should issue.

And your orators further show that the said lease further provided with respect to the two classes of securities therein contemplated, viz: those then existing, and those thereafter to be issued under the covenants relating to additions and enlargements, that the securities existing at the time the lease was made should be entitled to preference in case of foreclosure, the provision for such preference being as follows:

"It is further mutually covenanted and agreed that in case of foreclosure and sale of either of the aforesaid class of bonds now existing, or which may hereafter be created, then the seven millions of dollars of stocks and bonds named in this instrument shall be first fully paid and discharged, from and out of the proceeds of sale, and the balance of such proceeds shall be applied to the payment of the remaining bonds in the order of their priority."

And your orators show to the Court, that in order to give effect to this provision, the lessee was thereby obligated in case of the issue at any time thereafter of stock or bonds for additions or enlargements upon said demised property expressly to provide in creating such stock or bonds that security therefor should rest

18 upon such additions and enlargements and that holders thereof could not look for satisfaction to the property mentioned in the lease, but to such surplus only as might exist after sale of said property and after satisfaction of the preferred securities.

Your orators allege that upon the execution and delivery of said indenture of lease the Defendant Delaware Company entered into and upon the railroad of the defendant Susquehanna Company making improvements and enlarging the capacity thereof and securing possession of large amounts of the capital stock of said company; that question arose whether the shares of capital stock of the Susquehanna Company so acquired by the Delaware Company were properly authorized and issued; that it was to the interest of the Susquehanna Company that under the provisions relating to the enlargement of its property bonds should be issued rather than stock, also to restrict the amount of bonds which could so be issued; that it was to the interest of the Delaware Company to procure in place of the stock certificates which it then held new securities of unquestioned validity and also to procure the rescission of that provision of the lease giving to securities therein mentioned a preference over those thereafter to be issued, and that for all these purposes and to adjust the differences which had arisen between said parties in reference to the issue of additional securities beyond those in existence when the lease was made a supplemental contract was on or about the seventh day of March, 1876, made and entered into between the said Delaware Company and the said Susquehanna Company, the said supplemental contract reciting the original lease, and your orators attach hereto a copy of said supplemental contract, marking the same "Exhibit A" and expressly refer thereto and to the original lease therein recited and make the same a part hereof as though inserted at this place. For convenience of reference your orators have in said exhibit separately entitled the original lease and the provisions of the supplemental agreement, have numbered the
19 paragraphs of the original lease and added marginal subtitles, all additions to the text being printed in red ink.

Your orators show that in and by the said supplemental contract the questions which were at issue between the parties were compromised, the Delaware Company surrendering to the Susquehanna Company certificates for 15,950 shares of stock in said Susquehanna Company, and the Susquehanna Company upon its part agreeing that the total amount of its capital stock be fixed at and limited to the sum of $3,500,000; that in respect to said capital stock the distinction contained in the lease between the two classes of securities therein provided for should be abrogated and made of none-effect; that all of said stock should share equally in such savings of interest as might thereafter be effected, and to this end, after the one million dollars of the Albany City Bonds issued to the Susquehanna Company should be paid by the operation of the sinking fund, the sum of seventy thousand dollars a year, being part of the original rental of $490,000 should not be applied for the exclusive benefit of the stock amounting at par to $2,500,000 contemplated by the original lease, but should be applied to the total amount of the capital stock as fixed and limited by the supplemental contract, thus making the dividends upon 35,000 shares of stock under the conditions then existing 9% per annum; that the said covenants were intended for the equal benefit of all holders of the increased capital stock of the said defendant Susquehanna Company; that the Delaware Company

in and by the said supplemental contract agreed upon demand to endorse upon each certificate of stock in the Susquehanna Company its guaranty of payment of all sums which should become due to stockholders in said Susquehanna Company under the provisions of said lease and of said supplemental contract and to execute the said guaranty under its corporate seal; that the defendant Delaware Company did in fact guaranty all such payments to your orators and has made directly to your orators and the other stock-
20 holders in said Susquehanna Company its payments accruing under said lease and supplemental contract, save as the said Delaware Company is in default thereon, as hereinafter stated.

Your orators therefore show to the court that the lessee, in and by said supplemental contract agreed to pay for the demised property a total minimum annual rental as follows:

Minimum rental fixed by original lease	$490,000.
Additional dividends to be paid on additional $1,000,000 of stock	70,000.
Total	$560,000.

That in and by said supplemental contract the said lessee agreed to pay as rental for the demised property said sums of $560,000 and in addition thereto interest upon all bonds which should be issued as in said contract provided.

That by said contract in order to provide for the payment of the then outstanding mortgage bonds and to pay the said Delaware Company for the cancelling and surrender of the aforesaid 15,950 shares of stock, and for other purposes as stated therein, it was agreed that the defendant Susquehanna Company should make, execute and deliver its mortgage to the Farmers' Loan & Trust Company of the City of New York to secure bonds of the par value of $10,000,000; that the said mortgage was in fact made, executed and delivered, the said bonds were issued and that in accordance with the provisions of the said contract and of the mortgage made in pursuance thereof, part of the said bonds drew interest at 7%, and part at 6%; that in said agreement it was provided that the bonds of the Susquehanna Company issued by said company under mortgages which were in existence at the date of said lease, amounting to the total sum of about $3,500,000 should be retired by bonds issued under the mortgage to the Farmers' Loan & Trust Company, bearing 6% interest, and that said bonds were thereafter in fact so retired, and replaced by bonds drawing a lower rate of interest as aforesaid.

21 Your orators show that the said mortgage to the Farmers' Loan & Trust Company is by said Supplemental Agreement expressly designated and entitled a "First Consolidated Mortgage" and secured equally bonds of both classes described in the original lease; that in and by said lease it was expressly covenanted and agreed that in case the bonds then existing should be renewed or retired by another issue of bonds, such new bonds should be for the same amount as the bonds so retired, or sufficient by their net proceeds to provide for the payment of the bonds so retired, and that

neither party to said lease could upon the retirement of the then existing bonds, issue in place thereof bonds in excess of the limit thus fixed; that the class of bonds described in said original lease as the then existing bonds being the bonds of the Susquehanna Company to the amount of about $3,500,000 upon which it was agreed that the interest paid by the Delaware Company be credited as part of its minimum annual payment of $490,000 rent reserved by the original lease, and the second class of bonds described in said original lease being bonds to the amount of about $6,500,000 issued for the additions and enlargements upon which it was agreed that the Delaware Company should pay interest in addition to the annual rent of $490,000 reserved by the original lease, together constitute the issue of $10,000,000 secured by the mortgage to the Farmers' Loan & Trust Company.

Your orators further show that in the year 1906 the bonds secured by the mortgage to the Farmers' Loan & Trust Company were paid and retired by a new issue of bonds for the same principal sum bearing interest at three and one-half per centum per annum, that the (*mortgage*) said last named issue is now in existence and that the bonds now outstanding represent and include both classes of bonds mentioned in the lease and supplemental agreement hereinbefore described.

Your orators further show to the court, that the defendants herein give out and insist that the provisions for the payment of rent
22 in the original lease contained were rescinded by the supplemental agreement and replaced by the provisions thereof whereby the defendant, Delaware Company, guaranteed dividends at the rate of nine per cent. (9%) upon the stock of the Susquehanna Company.

And your orators show, that said guarantee does not in fact restrict the obligations of said defendant, but, as hereinafter stated, varies the terms of the guarantee undertaken by it in the original lease; that by said lease the defendant, Delaware Company, guaranteed to pay dividends at the rate of seven per cent. (7%) upon stock in the Susquehanna Company not exceeding at par value the amount of two and one-half million dollars ($2,500,000) and agreed to pay the surplus rent to the Susquehanna Company; that in and by the said supplemental agreement the defendant, Delaware Company, guaranteed, upon payment of the Albany loan, to pay the amount which it should thereby be relieved from paying as interest upon said loan directly to stockholders of the Susquehanna Company, making dividends thereon at the rate of nine per cent. (9%) upon an increased amount of stock; but that the provision in the original lease, that the surplus of rent should be paid to the Susquehanna Company was not rescinded or modified, and that it was in and by the said supplemental agreement expressly stipulated that all and singular the covenants, agreements and provisions, in the original lease, except as modified in the supplemental agreement, should be and remain in full force, the same to all intents and purposes as though the said supplemental agreement had not been made.

And your orators therefore show, that the assertion that the pro-

visions in the original lease for payment of rent are wholly superseded by the supplemental agreement is without foundation; that notwithstanding this fact, the assertion has been widely made by the Delaware Company and has been supported by misleading statements as to the contents of the contracts between the Delaware Company and the Susquehanna Company; that on the 18th day of December, 1905, the Delaware Company caused to be published a state-
23 ment, whereof a copy is hereto attached and marked "Exhibit B"; and your orators are informed and believe and so charge that officers and directors of the Susquehanna Company, acting in collusion with and for the benefit of the said Delaware Company, knew and approved of the said publication.

That as your orators are informed and believe for the purpose of protecting the defendant, Delaware Company, upon its obligation in the premises and to enable it largely to participate in the benefit of all payments made under said lease to the Susquehanna Company, the defendant, Delaware Company, and the directors of the Susquehanna Company herein named, devised a plan for the issue of a large amount of additional stock in the Susquehanna Company and the delivery of the same to the Delaware Company, as hereinafter stated.

Prior to the maturity of the bonds secured by the mortgage to the Farmers' Loan & Trust Company, and on or about the 15th day of March, 1905, the Board of Directors of the Albany and Susquehanna Railroad Company called a special meeting of the stockholders of the said Company, to be held on the 7th day of April, 1905, for the purpose of considering and acting upon a proposition, in accordance with the request of the Delaware and Hudson Company, to make a mortgage upon the property of the Susquehanna Company to secure an issue of $10,000,000 three and one-half per cent. forty-year bonds, principal and interest thereof to be guaranteed by the Delaware and Hudson Comapny and to be delivered to the Delaware and Hudson Company for the redemption of the $10,000,000 first consolidated mortgage bonds of the Susquehanna Company maturing April 1, 1906; and of agreeing with the Delaware and Hudson Company that whenever that Company should surrender to the Susquehanna Company any of the said new three and one-half per cent. bonds, the Susquehanna Company should issue to the Delaware and Hudson Company in lieu thereof an equal amount of the four per cent. preferred stock of the Susquehanna Company; and of author-
24 izing an increase of the Susquehanna Company's capital stock in the amount of $10,000,000, consisting of 100,000 shares of $100 each, preferred both as to principal and dividends, to be issued at par in retiring the said new three and one-half per cent. bonds upon the surrender of the same by the Delaware and Hudson Company, or if the Delaware and Hudson Company should so request, to issue the said new stock at par in the first instance in lieu of the said new bonds provided that the aggregate amount of the stock and bonds of the Company outstanding at any time should not exceed the amount of $13,500,000 at par; that the said call for said special meeting was by order of the Board of Directors of the Susquehanna

Company and signed by Robert Olyphant, as President, and W. L. M. Phelps as Secretary, and that accompanying said call was a circular issued by the Board of Directors of the Susquehanna Company setting forth the objects of the said special meeting and urging upon the stockholders of the Susquehanna Company the adoption of the proposed plan, stating that their situation would be greatly improved thereby and that the offer of the Delaware and Hudson Company was in every aspect a favorable one for the Susquehanna Company and its stockholders; that accompanying said call and circular was a proxy in accordance with the said plan, appointing Robert Olyphant, James H. Manning, George I. Wilber, Robert C. Pruyn and William L. M. Phelps, attorneys to vote the stock at the said special meeting, and the stockholders were urged in said circular to sign and return said proxies.

And your orators attach hereto copies of the said notice, also of the said circular and also of the said form of proxy, making the same a part hereof, as though inserted at this place and marking the same "Exhibits C," "D," and "E," respectively.

And your orators show, that the said notice, circular and form of proxy were issued by the directors and officers of the Susquehanna Company, acting in collusion with the defendant, Delaware
25 Company, and for the interest of the said Delaware Company; that the statements in the said notice and circular incorrectly stated the contracts between the defendant companies; that in and by the original lease it was provided that when the bonds, interest upon which is to be paid by the lessee, arrive at maturity, if the same be not changed by the holders thereof for new bonds and payment of principal be demanded and be not paid by the lessor, then the lessor in order to protect the property leased from foreclosure and sale should if so required by the lessee issue in due form new bonds, payable at such time and in such manner as the lessee should require, or shall, at the option of the lessee, issue stock therefor, and should deliver the said bonds or stock to the lessee to be negotiated and sold, the net proceeds arising therefrom to be applied to the payment of such maturing bonds and that the new bonds or stock should be sufficient in amount to provide by their net proceeds for the payment of such maturing bonds; and the payment of the interest or dividends upon such new bonds or stock should be guaranteed in the same manner as the interest upon such maturing bonds.

Your orators further show, that the provisions in the original lease for the retirement of bonds at maturity by the issue of stock, was expressly rescinded and set aside by the provision in the supplemental agreement that the total amount of the capital stock of the Susquehanna Company should be fixed at and limited to the sum of three million, five hundred thousand dollars ($3,500,000); that certificates representing stock in excess of said sum in possession of the Delaware Company should be surrendered and that in place thereof bonds should be issued.

Your orators show, that in and by the said circular and notice issued to stockholders of the Susquehanna Company as aforesaid, reference was made to the provisions of the original lease but the fact that these provisions had been rescinded was suppressed and no

reference was made to the provisions of the supplemental
26 agreement bearing thereon; that the said notice and circular were thereby made misleading and that by means thereof many stockholders in the Susquehanna Company were induced to sign the proxies which were requested, authorizing the persons therein named to vote for an increase of stock in the Susquehanna Company; that said provisions, so submitted to the stockholders of the Susquehanna Company, were urged upon said stockholders by the directors of the Susquehanna Company acting in collusion with and at the instance of the defendant, Delaware Company, and for its benefit; and your orators are advised that said propositions were not only in violation of the terms of the supplemental agreement as aforesaid, but were also in violation of the original lease and of your orators' rights in the effort to give to the Delaware Company and to no other stockholder in the Susquehanna Company a continuing option to exchange bonds for stock; also in that it was sought to make stock so to be issued a preferred stock; also in that it was sought to issue said stock to the Delaware Company at par, although its market value would be much greater; and also in that by making the proposed issue bear four per cent. dividends instead of seven per cent. dividends as contemplated in the original lease, was sought to give to the Delaware Company upon its purchase of the proposed stock a large number of votes for a comparatively small outlay of capital; that the defendant Delaware Company, and the officers and directors of the defendant, Susquehanna Company, were aware at the time the said notice, circular and forms of proxies were issued that the proposed proceeding was in violation of the contracts between the defendant, Susquehanna Company, and the said Delaware Company and of the rights of stockholders in the Susquehanna Company and that upon complaint by any dissenting stockholder, the contemplated proceedings would be enjoined.

Your orators further show, that a small minority of the stockholders in the Susquehanna Company did in fact object to the issue of additional Susquehanna stock and presented their objection
27 at the office of the Delaware and Hudson Company in New York to the President of said Company, and that by reason of objections so made by stockholders, the Delaware Company and the directors of the Susquehanna Company abandoned the effort to secure an increase of stock in the Susquehanna Company as aforesaid.

Your orators further show that in and by the said lease and supplement thereto the entire and exclusive management and control of all the railroad and property of the lessor was given over to the lessee; that the lessee agreed to keep the same in repair and operation and itself to perform all and every duty and obligation toward the public imposed upon the lessor by its charter; that by said contracts it was agreed that the corporate organization of the lessor should thereafter be maintained, but that the same was to be done at the expense of the lessee for its benefit and that said lessee was given the right at any time and in all places to use the corporate name of the Susquehanna Company in any suits or proceedings wherein it shall be necessary or proper for the enforcement of its rights against third

parties and your orators allege that by the provisions of said lease and agreement the Susquehanna Company substantially ceased to exist save as a continuing source of title for said lessee and for the protection of its interests; that all its active functions were assumed by and have since been performed by the lessee, and that said lessee in and by the said lease and supplemental agreement assumed direct relations with the bondholders and stockholders in the Susquehanna Company making said bondholders and stockholders its creditors.

Your orators further show that the Act of the Legislature of the State of New York passed April 10, 1852, authorizing the City of Albany to make a loan to the Albany & Susquehanna Railroad Company provided that the Susquehanna Company should pay to the Trustees of the sinking fund of the City of Albany all premiums
28 received upon the sale of bonds issued under the provisions of said Act and should also pay to said Trustee annually 1% on the entire loan by said Act authorized; that the said Act further required that no portion of bonds therein authorized be issued or loaned to the Company until certain requirements should have been carried into effect, among others, the execution of a mortgage by the Susquehanna Company to the Mayor, Aldermen and Commonalty to secure principal and interest of the bonds of the City by said Act authorized and payments to the sinking fund as therein required, and further that upon compliance with all the conditions of said act and the approval of the mortgage by the Common Council, then the Mayor of the City should execute and deliver the bonds as authorized by said act; that in accordance with said provisions the Susquehanna Company did on or about the first day of November, 1865, execute its mortgage to secure the bonds loaned by the City of Albany and that in and by said mortgage after providing for the payment of principal and interest of said bonds and after providing for other payments to the Trustees of the sinking fund of the City of Albany, it was further provided that in case the Railroad, with the consent of the mortgagee, should sell any lands or real estate which were not requisite for use of the Road the proceeds thereof should be received by the Trustees of the sinking fund of the City of Albany and be invested and held by them as a fund toward the payment and redemption of said bonds or be applied by them directly to that purpose. And your orators are informed and believe and charge that the amounts so due and payable by said lessees to said sinking fund if made would have been sufficient to have paid said Albany City bonds before the year 1902, and that thereafter the amount which the lessee was relieved from paying for interest and sinking fund on said bonds should have been paid as in said lease and supplemental agreement provided, making dividends at the rate of nine per cent. on stock in said Susquehanna
29 Company; that the defendants insist that the said loan was paid in the year 1902 and not before, that your orators were entitled to receive dividends at the rate of nine per cent. upon their said stock on the first day of January, 1903, and not before. And your orators show that the said defendant Delaware

Company has paid dividends at said rate upon and since the first day of January, 1903, and that prior to said date the said defendant paid dividends on said stock at the rate of seven per cent. and no more; that no account of the amounts and investments of said sinking fund has been made to your orators; that the accounts showing payments made by the defendants to the trustees of the sinking fund of the City of Albany and the investments of money so paid are in the possession of the defendant corporations; that in or about the year 1881 the City Hall in the City of Albany, wherein said accounts were kept, was destroyed by fire; that the accounts and records of said trustees were then destroyed; that since said year the said Trustees have kept no complete accounts and that your orators are informed and believe that the only existing records and accounts of the said sinking fund payments and investments are those kept by and in the possession of the defendant companies.

Your orators further show that the said accounts are extremely complicated, involving numerous payments made at different times by the defendant corporations; the investments thereof made by the trustees and the receipts and disbursements made on account of said investments; that your orators are entitled to a full and complete account thereof under the orders of this honorable court; that upon taking of such an account a date should be fixed by the decree of this court when as between your orators and said defendant the said loan should be considered paid by the operation of said sinking fund; that from and after said date the defendant Delaware Company should be ordered and decreed to pay to your orators in accordance with the terms of their guarantee as stated in said supplemental contract the amount so owing to your orators upon said guarantee, and your orators are informed and believe and allege that upon such account being taken the said defendant will be found indebted to your orators in a sum largely exceeding two thousand dollars.

Your orators further show that upon the retirement of bonds secured by the earlier mortgages above mentioned by later bonds bearing a lower rate of interest, the said lessee was bound under the provisions of said lease to pay to the Susquehanna Company the amount which it was then relieved from paying as interest, upon said bonds, but your orators show that the defendant Delaware Company has failed and neglected so to do, but it has kept and retained to its own use all saving of interest so made.

That your orators are informed and believe and so allege that said bonds bearing seven per cent. interest were retired as aforesaid by the issue of bonds bearing six per cent. interest prior to the year 1880; that upon such retirement the said Delaware Company became obligated under the provisions of said lease annually to pay to said Susquehanna Company for its stockholders the difference between six per cent. and seven per cent. interest upon said bonds, being the sum of thirty-five thousand dollars a year, and that the amount thereof should have been added to the semi-annual dividends paid upon the stock of the Susquehanna Company, and that

if so added would have increased the amount of each half yearly dividend one-half of one per cent. upon the par value of said stock; that there is now due and owing from the said Delaware Company to said Susquehanna Company the principal amount of all such arrears, together with interest thereon from the date and dates when the same became due, and your orators believe and allege that the principal amount so due from the Delaware Company to the Susquehanna Company exceeds the sum of eight hundred and seventy-five thousand dollars; that the said sum of money so owing to the Susquehanna Company should be paid to the stockholders in said company as a dividend upon their stock and that there is
31 now due and owing to the holders of stock in the said Susquehanna Company from the defendant Delaware Company the amount of one dollar upon each share of stock in the Susquehanna Company for each year since the retirement of said bonds as above stated to the present time with interest thereon, and that the principal amount of such arrears so due to your orators largely exceeds the sum or value of $2,000.

That the defendant companies should account to and with each other and with your orators, and should show the time and times when the seven per cent. bonds were retired as aforesaid; should show the time and times when the bonds were issued under the mortgage to the Farmers' Loan & Trust Company, the amount of payment of rent made under the provisions of said lease, and the said Delaware Company should pay to the said Susquehanna Company for your orators, or to your orators, to be credited upon the rental due to the Susquehanna Company as the court may direct, all unpaid rental, together with lawful interest thereon from the day when the same became due.

Your orators further show that in and by the said lease it was provided that during the term thereof the legal organization of the Susquehanna Company should be kept and continued at the expense of the Delaware Company, not exceeding, however, the annual sum of $1,000, and that the Susquehanna Company would when thereunto reasonably requested by the Delaware Company do and perform at the expense of said Delaware Company all such reasonable acts, matters and things as may be proper for the protection, preservation and enjoyment of the demised property and to carry said lease into effect; that under said provision the said Delaware Company has since the making of such lease maintained the corporate organization of said Susquehanna Company and for such purpose with the notice of the annual meeting of the Susquehanna Company has each year sent to stockholders of the Susquehanna Company a request for proxies to vote upon said stock. That stockholders in the defendant Susquehanna Company are very
32 numerous and that about four-fifths in number of said stockholders own fifty shares of stock in said company or less; that upon all of said stock the Delaware Company has guaranteed payments of the dividends as before stated; that the officers and directors of the defendant Delaware Company have represented to the stockholders of the Susquehanna Company that the interests of

the two companies were not in conflict; that the Delaware Company has fully performed all its obligations toward the Susquehanna Company and toward its stockholders, and that by means of such representations the Delaware Company has procured from the stockholders in the Susquehanna Company authority to vote upon their stock at the annual meeting of said company; that during the period of thirty years last past the directors elected by the use of proxies obtained as aforesaid have been nominees of the Delaware Company; that during all of said period and at the present time the directors of the Susquehanna Company have been and are entirely dominated by the Delaware Company; that at the present time and for more than two years last past, the Board of Directors of the Susquehanna Company has been composed of the following named twelve persons: Robert M. Olyphant, George I. Wilber, David Willcox, R. Suydam Grant, Charles A. Peabody, William S. Opdyke, Abel I. Culver, Charles A. Walker, William L. M. Phelps, Robert C. Pruyn, James H. Manning and Robert Olyphant; that the above named Robert M. Olyphant, is Chairman of the Board of Directors of the Delaware Company and appears upon the stockbooks of the Susquehanna Company to own five shares of stock in said Company and no more; that David Willcox is President of the Delaware Company; that the first five persons above named—Olyphant, Wilber, Willcox, Grant and Peabody are directors of the Delaware Company and that said Grant and Peabody appear on the stock books of the Susquehanna Company to own five shares and one share of stock in said Company and no more; that William S. Opdyke is general counsel
33 of the Delaware Company and appears upon the stock books of the Susquehanna Company as the owner of one share of stock in said company and no more; that Abel I. Culver is second Vice-President of said Delaware Company and appears upon the stock books of the Susquehanna Company to own one share of stock in said Company and no more; that Charles A. Walker is treasurer of the Delaware Company and appears upon the stock books of the Susquehanna Company to own five shares of stock in said company and no more.

And your orators are informed and believe and so allege that the said directors and officers of the Delaware Company above named are largely interested in said Delaware Company and in fact control said defendant Company and its Board of Directors; that they are under a duty to the said Delaware Company and to the stockholders thereof to represent that company and to protect its interest as against your orators, and as against the Susquehanna Company.

Your orators further show that William L. M. Phelps, the secretary of the Susquehanna Company, and a member of its board of directors, is so employed by the Delaware Company and that he is by said company continued in said position; that Robert Olyphant appears upon the stock books of the Susquehanna Company to own one share of stock in said company and no more; that your orators are informed and believe that the said Robert Olyphant is engaged, as an agent or representative of the Delaware Company in the business of dealing in coal which is mined and transported by it and

that his said business is dependent upon the said Delaware Company; that said Olyphant is largely interested in the Delaware Company, and is represented upon the Board of Directors thereof by Robert M. Olyphant above mentioned; that your orators are informed and believe and so charge that James H. Manning and Robert C. Pruyn are both largely interested with the Delaware & Hudson Company having intimate business relations therewith, and that Robert C. Pruyn appears upon the stock books of the Susquehanna Company to own one share of stock in said company and no more; and your orators charge that the interest of said Robert M. Olyphant, R. Suydam Grant, Charles A. Peabody, William S. Opdyke, Abel I. Culver, Charles A. Walker, William L. M. Phelps, Robert C. Pruyn and Robert Olyphant, in said Susquehanna Company is a nominal interest only; that the stock standing in the names of said directors is so placed for the purpose of qualifying said persons to act as directors of said Susquehanna Company and that in fact said persons have been elected directors of said Susquehanna Company by the votes of the Delaware Company and of persons interested therein, and upon the Board of Directors of the Susquehanna Company represent the interest of said Delaware Company in opposition to the interests of the Susquehanna Company.

Your orators further charge that the above named directors have long occupied the position of directors of the said Susquehanna Company and have long been interested in the defendant Delaware Company; that they and each of them have long known that the said Delaware Company was indebted upon the said lease and supplemental agreement as hereinbefore stated, but that they have conspired with the said Delaware Company to deprive the Susquehanna Company and its stockholders of the income to which they are entitled as aforesaid, for the benefit of said Delaware Company; that at the present time, as appears from the stock books of the defendant Susquehanna Company the defendant Delaware Company owns about 4500 shares of stock in said Susquehanna Company; that in addition thereto the directors of the Delaware Company individually own or represent over 5,000 shares of stock in the Susquehanna Company; and at the present time your orators are informed and believe and so charge that the Delaware Company controls a majority of stock in the Susquehanna Company and votes, or procures the same to be voted in opposition to the interest of the said Albany and Susquehanna Rail Road Company; your orators further allege that the said board of directors of the Susquehanna Company is composed of the same persons who have wrongfully deprived your orators and the Susquehanna Company of the sums due to them and to it under the provisions of said lease and supplemental contract, and who have failed and refused to sue therefor and to collect the same; that the said board is dominated by, and is acting in collusion with the defendant Delaware Company for the purposes aforesaid, and that no demand for action in the premises has been made of the directors of the Susquehanna Company for the reason that such demand, under the facts and circumstances above set forth

would be idle and nugatory, and that this suit is not a collusive one to confer jurisdiction upon the Circuit Court of the United States in respect to a matter of which it would not otherwise have cognizance.

Your orators show that the interests of the Susquehanna Company, and of its stockholders are in fact different from the interests of the Delaware Company in the matters hereinbefore stated; that it is the duty of the Susquehanna Company to protect the interests of its stockholders, to collect the sums owing to it from the Delaware Company and to distribute the same among its stockholders.

Forasmuch therefore as your orators are without remedy in the premises save in a court of equity where such matters are cognizable, and to the end that the said defendants full, true and perfect answer make, but not under oath, answer under oath being hereby expressly waived, your orators pray that an account may be taken under the direction of this honorable court.

Of all sums paid by the defendants to the trustees of the sinking fund of the City of Albany and of the dates of such payments, of the investments thereof receipts therefrom, and of all payments and expenses charged against said fund; and that for the purpose
35 aforesaid the defendants may be required to make full discovery of the accounts and records in their possession relating thereto; that a date may be fixed by decree of this court when as between your orators and said Delaware Company the said Albany loan shall be regarded as paid by the operation of said sinking fund and that for the period elapsed thereafter the defendant Delaware Company shall be directed to pay to your orators the balance of indebtedness upon their said guaranty.

That an account may be taken of the sums due from the said Delaware Company to the Susquehanna Company as rent according to the terms of said lease and supplemental contract; that the said Delaware Company may be required to pay all sums which upon such accounting shall be found owing by it and of all sums which shall be owing at the date of decree herein, and that said sums be paid to said Susquehanna Company for the benefit of its stockholders and by said Company to be paid to them; or, that the proportion thereof belonging to your orators and all other persons similarly situated who may join herein be determined by decree of this court and be paid to them, with interest from the time when the same became due; that the defendants may be enjoined and restrained from making any settlement of the matters in controversy or from entering into any reference or arbitration of them without leave of this honorable court, and that for the purposes aforesaid a temporary restraining order may issue; that from all sums so awarded may be paid your orators' outlay in the premises, including fees of attorneys and counsel, and that your orators may have such other and further relief as the nature of the case may require and to your honors may seem meet.

May it please your honors to grant unto your orators the writ of subpœna in chancery, commanding the defendants to be and appear on a certain day and under a certain pain to be therein specified, before this Honorable Court, there to stand to, abide by and

37 perform all that your honors may deem meet in the premises, and your orators will ever pray, etc.

AETNA INSURANCE COMPANY,
CONNECTICUT TRUST AND SAFE DEPOSIT COMPANY, *Trustee,*
SECURITY COMPANY, *Trustee,*
ATWOOD COLLINS, *Executor,*
FRANCIS R. COOLEY,
CHARLES P. COOLEY, AND
MELANCTHON W. JACOBUS,
Executors,
JONATHAN B. BUNCE,
DRAYTON HILLYER, AND
ARCHIBALD A. WELCH,
Trustees,
JOHN R. REDFIELD, *Trustee,*
ATWOOD COLLINS AND
JOHN R. REDFIELD,
Trustees,
JOHN D. BROWNE,
LUCIUS A. BARBOUR, AND
FRANCIS PARSONS,
Trustees,
MARY DANESI,
FANNY M. BARCLAY,
RHODE ISLAND HOSPITAL TRUST COMPANY, *Trustee,*
HOWARD O. STURGES,
WILLIAM L. HODGMAN, AND
HERBERT J. WELLS,
Trustees,
By HOWLAND, MURRAY & PRENTICE,
EDWARD W. SHELDON,
Their Solicitors.

ADRIAN H. JOLINE,
GEORGE WELWOOD MURRAY,
EDWARD W. SHELDON,
E. PARMALEE PRENTICE,
CHARLES P. HOWLAND,
Of Counsel.

38 Circuit Court of the United States, Southern District of New York.

AETNA INSURANCE COMPANY ET AL., Complainants,
against
ALBANY & SUSQUEHANNA RAILROAD COMPANY and DELAWARE & HUDSON COMPANY, Defendants.

STATE OF CONNECTICUT,
County of Hartford, ss:

Wm. Z. Clark, being first duly sworn on oath, says that he is the President of Aetna Insurance Company, one of the above entitled complainants, and as such duly authorized to make this affidavit for and on behalf of said corporation; that he has read the foregoing bill and knows the contents thereof, and that the matter and things therein stated are true, save such as are therein stated to be alleged or charged upon information and belief and as to such matters he believes them to be true.

WM. Z. CLARK.

Subscribed and sworn to before me this 7th day of June, 1906.
[SEAL.] FREDERICK H. HUBBARD,
Notary Public in and for the City and County of Hartford and State of Connecticut.

39 Circuit Court of the United States, Southern District of New York.

AETNA INSURANCE COMPANY ET AL., Complainants,
against
ALBANY & SUSQUEHANNA RAILROAD COMPANY and DELAWARE & HUDSON COMPANY, Defendants.

STATE OF CONNECTICUT,
County of Hartford, ss:

Arthur P. Day, being first duly sworn on oath, says that he is the Secretary of Connecticut Trust and Safe Deposit Company, one of the above entitled complainants, and as such duly authorized to make this affidavit for and on behalf of said corporation; that he has read the foregoing bill and knows the contents thereof, and that the matters and things therein stated are true, save such as are therein stated to be alleged or charged upon information and belief and as to such matters he believes them to be true.

ARTHUR P. DAY.

Subscribed and sworn to before me this 7th day of June, 1906.
[SEAL.] J. LINCOLN FENN,
Notary Public in and for the City and County of Hartford and State of Connecticut.

40 Circuit Court of the United States, Southern District of New York.

AETNA INSURANCE COMPANY ET AL., Complainants,
against
ALBANY & SUSQUEHANNA RAILROAD COMPANY and DELAWARE & HUDSON COMPANY, Defendants.

STATE OF CONNECTICUT,
County of Hartford, ss:

Francis Parsons, being first duly sworn on oath, says that he is the Secretary of the Security Company, one of the above entitled complainants, and as such duly authorized to make this affidavit for and on behalf of said corporation; that he has read the foregoing bill and knows the contents thereof, and that the matters and things therein stated are true, save such as are therein stated to be alleged or charged upon information and belief and as to such matters he believes them to be true.

FRANCIS PARSONS.

Subscribed and sworn to before me this 7th day of June, 1906.
[SEAL.] PAUL E. PARMELEE,
Notary Public in and for the City and County of Hartford and State of Connecticut.

41 Circuit Court of the United States, Southern District of New York.

AETNA INSURANCE COMPANY, CHARLES P. COOLEY ET AL., Complainants,
against
ALBANY & SUSQUEHANNA RAILROAD COMPANY and DELAWARE & HUDSON COMPANY, Defendants.

STATE OF CONNECTICUT,
County of Hartford, ss:

Charles P. Cooley, being first duly sworn, on oath says: That he is one of the complainants in this the above entitled cause and makes this affidavit on his own behalf and on behalf of all other complainants; that he has read the foregoing bill and knows the contents thereof, and that the matters and things therein stated are true, save such as are therein stated to be alleged or charged upon information and belief and as to such he believes them to be true.

CHARLES P. COOLEY.

Subscribed and sworn to before me this 7th day of June, 1906.
[SEAL.] H. W. THOMPSON,
Notary Public, County of Hartford, State of Connecticut.

42 EXHIBIT A.

Whereas, The Albany and Susquehanna Railroad Company (hereinafter called the Railroad Company), and The President, Managers and Company of The Delaware and Hudson Canal Company, (hereinafter called the Canal Company) on the 24th of February, A. D. 1870, made, entered into, executed and delivered an Indenture of Lease, as follows, to wit:

*Original Lease.**

This Indenture, made and entered into this twenty-fourth day of February, one thousand eight hundred and seventy, by and between The Albany and Susquehanna Railroad Company of the first part, and The President, Managers and Company of The Delaware and Hudson Canal Company of the second part, *witnesseth:*

Lease of railroad.—1. That the party of the first part, in consideration of the rent, covenants and agreements hereinafter mentioned, reserved and contained on the part and behalf of the party of the second part, its successors and assigns, to be had, kept and performed, has granted, demised and leased, and by these presents does grant, demise and lease unto the said party of the second part, its successors and assigns, the entire railroad of the party of the first part, lying, being and extending from its eastern terminus in the city of Albany, in the State of New York, in a south-westerly direction, through portions of the counties of Albany, Schenectady, Schoharie, Otsego, Delaware, Chenango and Broome, to its western terminus in the City of Binghampton, being in length one hundred and forty-two miles or thereabouts; also all the lands, tenements, hereditaments, appurtenances, buildings, fixtures and machinery appurtenant and belonging to or connected with the said railroad, or in any manner used or employed by the party of the first part in operating said railroad; also all rails, ties, fencings and erections of every kind belonging to, upon, or connected with said railroad; also all the cars, locomotives, engines, tools, machinery, equipments and appliances belonging to or connected with said railroad, and the use thereof; also all and every right of way, license, easement, right, privilege and immunity of the party of the first part, conferred by, and possessed and enjoyed under and by virtue of, its charter, and of any and every act passed and to be passed amendatory thereof, and otherwise, howsoever obtained, with the full right and authority to have, hold and use such rights of way, easements, rights, privileges and immunities as fully as the party of the first part might or could if these presents had not been executed. To have and to hold all and singular the above demised

Equipment, etc.

43

Habendum.

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railroad, premises, property, estate and effects, including the right of way, easements, licenses, privileges and immunities aforesaid, unto the party of the second part, its successors and assigns, from the day of the date hereof, for and during the full end and term of the charter of the party of the first part, or of any and every renewal and continuance thereof, yielding and paying therefor unto the party of the first part, its successors or assigns, rent at the rate of four hundred and fifty-five thousand dollars per annum from the date of these presents until the first day of January, one thousand eight hundred and seventy-one, and thereafter the annual rent of four hundred and ninety thousand dollars, payable in the way and manner and at the times hereinafter particularly stated.

Rent accruing on and after Jan. 1st, 1871, fixed at $490,000 a year.

2. And the said party of the second part, in consideration of the demise, covenants and agreements herein contained, and to be performed, fulfilled and kept on the part of the party of the first part, its successors and assigns, hereby covenants and agrees that it will pay as and for the annual rent aforesaid, semi-annually, the interest accruing and to become due and payable from and after the date of these presents, upon one million of dollars of six per cent. Albany city bonds, issued to the party of the first part under and by virtue of an act of the Legislature of this State, entitled "An act to authorize the city of Albany to make a loan to the Albany and Susquehanna Railroad Company," passed April 10, 1852, together with one per cent. thereon to the sinking fund, as mentioned and referred to in the aforesaid act, and will also pay, semi-annually, three and one-half per cent. for the interest accruing from and to become due and payable after the date of these presents, upon three and a half millions of dollars of certain mortgage bonds made and executed by the party of the first part, upon the aforesaid railroad property and effects, according to the terms and conditions thereof, and will also pay to the party of the first part, in equal monthly installments, from the date of these presents until the first day of January, one thousand eight hundred and seventy-one, at the rate of one hundred and forty thousand dollars per annum, and will also, from and after the first day of January, one thousand eight hundred and seventy-one, upon the first days of July and January in each year, pay a semi-annual dividend of three and one-half per cent. upon the then existing shares of the capital stock of the said party of the first part, not exceeding twenty-five thousand shares, and if so many

Covenant of lessee to pay interest on Albany loan;

Also to pay into sinking fund for Albany loan.

Also to pay interest on $3,500,000 bonds;

Also to pay dividends on stock:

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shares do not exist at the time of any such payment, or if the sums required for the payments before mentioned, shall not amount to the aforesaid four hundred and ninety thousand dollars, the balance not applied to the payment of such interest and dividends shall be paid to the said party of the first part. It being understood, however, that the interest and dividends to be paid as aforesaid shall and may be paid directly to the respective bond and stockholders.

Also to pay balance to Susquehanna Company.

Covenant of lessee to repair.—3. And the said party of the second part further covenants and agrees in manner aforesaid that during the term hereby granted, it will, at its own cost, risk and expense, maintain, preserve and keep the aforesaid railroad in good working condition and repair, as a first-class railroad, and so as to be suitable for the transaction of all the business that can be reasonably done thereon, and will also maintain, preserve and keep the side tracks, station houses, fixtures, appurtenances, tools, machinery, rolling stock and equipments belonging and appertaining to the said railroad, in as good repair, order and condition as the same are in at the date of these presents, and will maintain and keep in order all fences, cattle guards and warning boards which are or shall be necessary or required by law, and will operate, employ and use the said railroad, its fixtures and appurtenances in such manner as to do and perform in a proper manner all the business offered to and which can be reasonably done upon the same, and will perform all and every duty and obligation toward the public which the party of the first part would be legally bound to do and perform under its aforesaid charter if these presents had not been executed.

Covenant of lessee to endorse its guarantee of interest and dividends.—4. And the party of the second part hereby further covenants and agrees, in manner aforesaid, that, upon the due presentation of the aforesaid Albany city bonds, mortgage bonds, and the scrip or certificates of the stock, the interest and dividends upon which are to be paid as aforesaid, it will, by a proper instrument in writing, to be endorsed or stamped thereon respectively, and duly executed, guarantee to the owner and holder thereof payment of the interest and dividends thereon, as aforesaid, the dividends to be payable semi-annually, on the first days of January and July, as aforesaid, and the interest to be payable according to the terms and conditions of the said bonds; and in case the party of the first part at any time shall desire to use new bonds, either in renewals of, or to obtain means with which to pay, bonds now outstanding, or any portion of them, that the party of the second part will endorse or stamp such new bonds, in the manner aforesaid, and deliver the same to the party of the first part; provided that the new bonds, so endorsed or stamped, shall be for the same amount as the bonds then surrendered to the party of the second part for cancellation. And in

Renewal of outstanding bonds by lessor.

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case the aforesaid bonds, or any of them, shall at any time be converted into stock, that thenceforth the party of the second part will pay, in lieu of the aforesaid interest on said bonds, semi-annual dividends on said stock, at the rate of three and a half per cent., and, upon due presentation of such new stock, will endorse or stamp upon the same a guarantee of the payment of such semi-annual dividends, according to this agreement; and in all cases of new certificates being issued on the return of guaranteed certificates, or transfer of guaranteed shares, or new bonds having been issued in place of guaranteed bonds, the said party of the second part shall endorse or stamp the like guarantee on such new certificates and bonds; provided, however, and it is hereby understood and agreed, that in case the party of the first part shall fail to keep and perform these presents upon its part, that thereupon such guarantee, and each and every of them, shall become and be null and void.

Covenant of lessee to pay taxes.—5. And the said party of the second part further covenants and agrees, in manner aforesaid, that, during the time of this demise, it will pay, bear and discharge all taxes and assessments of every description assessed, imposed, levied and accruing upon the railroad, property and effects hereby demised, and upon the business done upon the said railroad, from the day of the date hereof, in the same manner and to the same extent as the party of the first part would be liable to pay if these presents had not been executed. And if, by any change of the law, the present tax or duty required of the said party of the first part shall be required of the said stockholders, then the said party of the second party shall pay the same. But the party of the second part
46 shall not be required to pay the present income tax upon the aforesaid interest and dividends, or any tax thereon imposed, or hereafter to be imposed, by whatever name the same may be called. And if the law under which tax is or may be levied requires the party of the second part to pay the same, then the amount of tax so paid may be deducted and kept back from and out of the aforesaid interest and dividends. And, further, that the party of the second part will pay all expenses for construction, repairs, salaries, and otherwise, which may be necessarily incurred on account of the railroad and demised premises, from the day of the date hereof; and will also pay and discharge all damages which may be recovered against the said party of the first part, for injuries to persons or property, or for negligence, or breach of duty as carriers or warehousemen, and in all respects save the said party of the first part harmless and indemnified from all damages, losses and penalties which may be incurred *or* arise in or by the conduct, use or operation of said railroad.

To pay for repairs, etc.

Lessor's covenant for quiet possession.—6. And the said party of the first part, for itself, its successors and assigns, hereby covenants and agrees to and with the said party of the second part, its successors and assigns, that it has full power and lawful authority to execute these presents, and that the said party of the second part,

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its successors and assigns, paying the said yearly rent above reserved, and performing the covenants and agreements herein contained on its part, shall and may at all times, during the continuance of this lease, peaceably and quietly have, hold, possess and enjoy the railroad property, rights and effects hereby demised, and every part thereof, without any manner of let, suit, trouble or hindrance, of or from the party of the first part, its successors or assigns, or any other person or persons whomsoever, lawfully claiming or to claim the same.

Lessor's covenant for further assurance.—7. And the said party of the first part further covenants and agrees in manner aforesaid, that it shall and will from time to time, during the continuance of this lease, make, execute, and deliver to the party of the second part, its successors and assigns, all and every such further and other leases, deeds, transfers, instruments in writing and assurances as by said party of the second part, its successors or assigns, shall be reasonably desired or required for fully effectuating the objects, intents and purposes of this lease, and of leasing the railroad and other property hereinbefore mentioned, and hereby leased or intended
47 so to be, and for more fully confirming and securing unto the said party of the second part, its successors and assigns, all the rights and privileges hereinbefore mentioned, and granted and secured, or intended so to be.

Lessor's organization to be maintained at expense of lessee.—8. And the said party of the first part further covenants and agrees that it will, during of the term of this demise, keep and continue, at the cost and expense of the said party of the second part, not exceeding, however, the annual sum of one thousand dollars, its legal organization, and also at all times, when thereunto reasonably required by said party of the second part, do and perform, at the expense of the said party of the second part, all such reasonable acts, matters and things as may be proper for the due protection, preservation and enjoyment of the property hereby demised, and to carry into effect the true intent and meaning of this instrument, so far as the same may be done consistently with the rights of the said party of the first part, and in default thereof, the same may be done by, but at the expense of, the said party of the second part, and therein the said party of the second part may use the name, power and authority of said party of the first part; and further, that the said party of the second part may, at any time, and in all places, at its own expense, use the corporate name of the party of the first part in any suits or proceedings wherein it shall be necessary or proper for the enforcement of its rights against the third parties.

Assignment of certain contracts, etc.—9. And the said party of the first part hereby further covenants and agrees, in manner aforesaid, that it will and does hereby assign and transfer to the party of the second part, its successors and assigns, by a proper instrument in writing to be duly executed, all its right, title and interest of,

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to a certain contract made and executed by and between the
rty of the first part and the Cherry Valley and Mohawk River
ad Company, now known as the Cherry Valley, Sharon and
y Railroad Company, and also in and to a certain contract
with the Fall Creek Coal Company, in relation to operating
lroad belonging to the last aforesaid Railroad Company, and
rrying coal thereon for the said Company, and also the con-
or additional land at Albany, made with the Van Rensselaer
and also the contract for the erection of a joint depot at
amton, made with the Erie Railway Company and with the
se, Binghamton and New York Railroad Company; and also
all pending contracts for supplies, materials and equipments
not yet delivered, and which contracts, respectively, the party
of the second part agrees to perform, and carry out according
tenor and effect thereof, as fully as the party of the first part
be bound to do if these presents were not executed; and the
ty and interests resulting from said contracts and the per-
nce thereof shall be subject to this lease, and shall form a
f the demised property.

k and bond register to be kept.—10. It is hereby mutually
nted and agreed, by and between the parties hereto, that there
e kept, at the office of the party of the second part, a book
ster containing a record in proper form of the aforesaid stock,
each and every of the aforesaid bonds, and of the bonds
may be issued in substitution therefor, which register shall be
t all reasonable and proper times to the inspection of the party
first part, its successors or assigns.

And it is further mutually covenanted and agreed, that when
nds, the interest upon which is to be paid by the party of the
part, as above provided, arrive at maturity, if the same be
changed by the holders thereof for new bonds, and payment
of the principal be demanded and be not
ewals of out- paid by the party of the first part, then the
ng bonds by party of the first part in order to protect the
property hereby leased from foreclosure and
sale, shall, if so required by the party of the
part, issue in due form new bonds, payable at such times
such manner as the party of the second part shall require, or
t the option of the party of the second part, issue stock there-
d shall deliver the said bonds or stock to the party of the
part to be negotiated and sold, and the net proceeds arising
om shall be applied to the payment of such maturing bonds;
ew bonds or stock to be sufficient in amount to provide, by
et proceeds, for the payment of such maturing bonds, and the
nt of the interests or dividends upon such new bonds or stock
e guaranteed in the same manner as have been the interest
uch maturing bonds.

nent of stock subscriptions.—12. And it is further mutually
nted and agreed, that the said party of the first part will,
er requested by the said party of the second part, require

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the payment, in installments, of the balance of the nine thousand five hundred shares of stock which has been subscribed, and on which an installment of ten per centum has been paid, and will
49 pay over the said installments, when collected or received, to the said party of the second part, and the said party of the second part will apply the same to the laying of additional track, the purchase of additional equipment, and other necessary improvements of said road, and will also pay an additional rental, semi-annually, at the rate of seven per centum per annum on such installments, as may from time to time be paid as aforesaid; and said stock when fully paid shall have the like guarantee as is hereinbefore provided for the twenty-five thousand shares of full paid stock, issued and to be issued as aforesaid, to the extent of the ninety per cent. to so be received by the party of the second part as aforesaid.

Issue of additional stocks or bonds of lessor for additional facilities.—13. And it is hereby further mutually covenanted and agreed, that in case the party of the second part shall at any time hereafter desire to enlarge the capacity of the said railroad by building a double track, extending the length thereof, or otherwise, that then, and in every such case, the party of the first part, its successors or assigns, shall and will make, execute and deliver to the party of the second part its successors or assigns, additional stock or bonds, in such form, for such amount, and payable at such times, as the party of the second part may require, which stock and bonds shall be delivered to and negotiated by the party of the second part, and the proceeds and money realized therefrom shall be received by it, and be used and applied in building such double track, enlargements and improvements, and in equipping and stocking the same; and the party of the second part shall and will thereafter pay the holders of such bonds or stock an interest or dividend thereon at the rate of seven per cent. per annum, in equal semi-annual payments, as hereinbefore provided in respect of the present bonds and stock, and shall and will also endorse or stamp thereon a guarantee of the payment of such interest and dividend in the way and manner above provided; but the total amount of all such additional bonds shall never be such that the aggregate liabilities of the party of the first part, in stock and bonds, shall exceed fifteen millions of dollars. But other than this the party of the first part, its successors or assigns, shall not nor will make or issue any bonds or stock, for any purpose whatever, beyond what have been already issued and are now in existence, except as hereinbefore provided, without the consent in writing of the party of the second part, its successors or assigns.

Aggregate of stock and bonds not to exceed $15,000,000.

49½ Lessee may make improvements.—14. It is hereby further mutually covenanted and agreed, that the said party of the second part may, from time to time, at its own expense, make all such alterations, improvements and additions in, upon or to the property hereby demised, as may be proper for its full enjoyment for railroad purposes. And in case said party of the second part shall

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at any time desire, for its more advantageous use of said demised property, to acquire, obtain or enjoy any additional lands, rights of way or other property, said party of the first part, when thereto reasonably required and indemnified against all expense and damage therefrom, shall aid therein, with its name, power and authority and in default thereof, such name, power and authority may be used by said party of the second part, after fully indemnifying the said party of the first part as aforesaid, and all lands, rights of way or other property which shall be so acquired or obtained, shall immediately be and become part of the property covered by this demise.

Lessee to have exclusive control of leased property.—15. And it is hereby further mutually covenanted and agreed, that the party of the second part, its successors and assigns, shall at all times, during the continuance of this lease, have the exclusive right to manage and control the railroad and premises, and to regulate and determine the rates of passage money, tolls, freights and charges for all the transportation over the whole or any part of said railroad and premises, and shall also have full, free and exclusive right to charge and collect all the passage money, rents, tolls, freights and charges, and to appropriate the same to its use; and shall have, use, exercise and enjoy all the rights, powers and authority aforesaid, and all other corporate powers and privileges which can or may be lawfully exercised and enjoyed on or about said demised railroad and premises, as fully, amply and entirely as the same might or could have been used, exercised and enjoyed by the party of the first part if this instrument had not been made, and as exclusively, fully, amply and entirely as the party of the first — have or shall acquire authority by law to grant the same, subject, nevertheless, at all times to the restrictions and regulations imposed by law.

Default by lessee.—16. And it is hereby further mutually covenanted and agreed, that in case of default in payment of interest and dividends on the bonds, stock and the sinking fund aforesaid, and if the same or any part thereof shall remain unpaid for the
49¾ space of sixty days from and after the time when the same shall become due and payable, then the said party of the first part shall have the right to enter upon and take possession of all the property hereby leased, and all depots, shops, buildings, tracks and other permanent property or rolling stock added thereto, and that the party of the second part will not unlawfully hinder or prevent such entry, nor the taking possession and using of all the said property by the party of the first part for its own benefit and use, and that this lease shall terminate upon the party of the first part so taking possession of the demised premises. Provided, however, that in case the party of the second part shall be unavoidably restrained by injunction or by law (not obtained by or upon their own action) from paying the aforesaid rent and performing the covenants herein contained, or any of them, then and in that case, the time during which the party of the second part shall be so restrained shall not be taken or considered as any part of the aforesaid sixty days. And

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further, that this lease shall not be assigned by the party of the second part without the consent in writing of the party of the first part first had and obtained.

Preference in case of foreclosure.—17. It is further mutually covenanted and agreed, that in case of foreclosure and sale of either of the aforesaid class of bonds now existing, or which may hereafter be created, then the seven millions of dollars of stock and bonds named in this instrument shall be first fully paid and discharged, from and out of the proceeds of said sale, and the balance of such proceeds shall be applied to the payment of the remaining bonds, in the order of their priority.

Form of guarantee.—18. And it is hereby further mutually covenanted and agreed, that the guarantee to be endorsed on the aforesaid bonds and stock, shall be in the following form, merely changing the same so far as may be necessary to make the same applicable to the said stock, that is to say: The President, Managers, and Company of The Delaware and Hudson Canal Company hereby guarantee to the holder hereof the payment of the interest on this bond, according to the terms thereof, subject to the conditions and provisions of a certain lease, made between the said Canal Company and The Albany and Susquehanna Railroad Company, bearing date the twenty-fourth day of February, one thousand eight hundred and seventy, and duly recorded in Albany and other counties, such guarantee to be duly executed under the corporate seal of the party of the second part.

19. And it is further mutually covenanted and agreed, that all the provisions of this instrument, shall extend to, and bind the respective successors and assigns of the parties hereto, and wherever mention is hereinbefore made of either party hereto, the successors and assigns of such party shall be deemed to be comprehended.

In Witness Whereof each of the parties hereto has affixed his corporate seal and caused these presents to be duly countersigned by its proper officer, the day and year herein first above written.

[U. S. Int. Rev. Stamp. ($1,225.50) Cancelled.]

[L. S.] THE PRESIDENT, MANAGERS, AND COMPANY OF THE DELAWARE & HUDSON CANAL COMPANY,
THOMAS DICKSON, *President.*

Attest,
CHARLES P. HART, *Treasurer.*

[L. S.] THE ALBANY & SUSQUEHANNA RAILROAD COMPANY,
J. H. RAMSEY, *President.*

Attest,
W. L. M. PHELPS, *Secretary.*

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*Provisions of Supplemental Contract.**

And whereas questions have arisen as to the proper construction of some of the provisions of said Indenture, and as to the rights and liabilities of the said parties thereunder, and as to whether the certificates issued by the said Railroad Company to the said Canal Company, dated the 26th day of July, A. D. 1872, for fifteen thousand nine hundred and fifty shares of the capital stock of said Railroad Company, were properly authorized and issued, or now are valid certificates.

And whereas both of the parties to said Indenture desire to now have the said questions and the rights and liabilities of the said parties respectively under the said Indenture definitely settled.

Now, therefore, in consideration of the premises and of one dollar by each of the said parties to the other, in hand paid before
51 the execution hereof, the receipt whereof is hereby by the said parties respectively acknowledged, and of the mutual agreements herein contained, they

Do Hereby Agree.

Capital stock of lessor fixed at $3,500,000.—First. That the total amount of the capital stock of the said Railroad Company shall be, and the same is hereby fixed at and limited to the sum of three millions five hundred thousand dollars, to be represented by thirty-five thousand shares of stock, of one hundred dollars each, upon which the said Canal Company shall, upon the first days of January and July in each year, pay a semi-annual dividend of three and one-half per cent. And the provision in the aforesaid recited Indenture contained, giving to twenty-five thousand shares of stock a preference in case of foreclosure,

Certain preference to $2,500,000 of stock mentioned in lease, abolished.

shall be and the same is hereby abrogated and made of none effect; and in consideration thereof, after the one million dollars of the Albany City Bonds, issued to the said Railroad Company, shall, by the operation of the sinking fund provided for the payment of said bonds, be paid, the amount to wit: The sum of seventy thousand dollars a year, which the said Canal Company will thus be relieved from paying into the sinking fund and upon said Bonds,

Addition to dividends when Canal Co. shall be relieved of paying into sinking fund and for interest upon Albany loan.

shall thereafter be added to the dividends to be paid to the stockholders, thus making the dividends to be paid by said Canal Company after the said Albany City Bonds are paid as aforesaid, upon the said thirty-five thousand shares of stock hereinbefore provided for nine instead of seven per cent. per annum, to be paid semi-annually, on the days hereinbefore men-

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tioned, for the payment of the semi-annual dividends of three and one-half per cent. And upon the execution and delivery of this Agreement, the said Canal Company shall, upon receiving the bonds hereinafter agreed to be issued to the amount, at par of one million five hundred and ninety-five thousand dollars, cancel and surrender up to the said Railroad Company the aforesaid certificates issued for fifteen thousand nine hundred and fifty shares of stock.

Issue of new mortgage for $10,000,000, which shall include former mortgage of $3,500,000.—Second. That the said Railroad Company, in order to provide for the payment of the Mortgage Bonds by it heretofore issued, and to pay the said Canal Company for the cancelling and surrender of the aforesaid fifteen thousand nine hundred and fifty shares of stock, and also such further sums as
52 the said Canal Company, now or hereafter, may be entitled to for expenditures made upon said demised Railroad and property, shall, in such due and legal form as the counsel of the respective parties hereto may advise, make and execute to the Farmers' Loan and Trust Company of the City of New York, (hereinafter called the Trust Company,) a mortgage to be designated as a "First Consolidated Mortgage," bearing date the first day of April, in the year of our Lord, one thousand eight hundred and *seventy-six*, upon all and singular the railroads, rolling stock, property, rights and franchises covered by and included in the aforesaid recited Indenture, or intended so to be, together with the betterments, improvements and additions thereto made since the making of said Indenture, and together with all the betterments, improvements and additions thereto hereafter made, and including all property hereafter acquired in anywise appertaining to the said Railroads or property, excepting money, shares, securities and things in action, to secure the payment of ten thousand bonds of one thousand dollars each, to be, as hereinafter provided, made, executed and delivered by the said Railroad Company, together with the interest thereon; which mortgage thus made and executed the said Railroad Company shall acknowledge and deliver to the said Trust Company.

Provisions as to issue of bonds.—And the said Railroad Company shall also for the hereinbefore recited purposes, in like due and legal form, from time to time, as hereinafter mentioned, make, execute and deliver to the said Trust Company ten thousand of its Bonds, payable to the said Trust Company or Bearer for one thousand dollars each, all to bear even date with said mortgage and to be made payable on the first day of April, A. D. 1906. Of which ten thousand Bonds, three thousand shall upon the execution of this agreement, be made, executed and delivered by the said Railroad Company to the said Trust Company, and shall bear interest at the rate of seven per centum per annum, to be paid semi-annually; and the principal and interest thereof shall be made payable in lawful money of the United States of America, at the office of the said Canal Company in the City of New York or at such other place in the said City as the said Canal Company may designate.

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And the residue of the said ten thousand Bonds shall be, by the said Railroad Company, from time to time, as requested by
53 the said Canal Company, made, executed and delivered to the said Trust Company so far and to such extent as the same may be required for the purposes hereinbefore mentioned, which Bonds shall bear interest, at the option of said Canal Company, either at the rate of seven per centum per annum, payable semi-annually in lawful money of the United States of America, or at the rate of six per centum per annum, payable semi-annually in gold, or at the rate of six per centum per annum, payable semi-annually in sterling; and the principal of the Bonds that bear interest at the rate of seven per cent. in currency, or six per cent. in gold, shall be made payable at the office of the said Canal Company in the City of New York or at such other place in the said City as the said Canal Company may designate, in lawful money of the United States of America, and the interest thereon shall be made payable at the same place; and the principal of as well as the interest upon such of the said Bonds as bear interest, payable in sterling, shall be made payable in sterling, at such place in the City of London, in England, as the said Canal Company may designate, and the payment of the principal of and interest upon all of the said Bonds which are issued by the said Trust Company for the purposes aforesaid shall be guaranteed by the said Canal Company; and the said Trust Company shall upon the cancellation and surrender by said Canal Company of the said certificates to be issued for 15,950 shares of the stock of said Railroad Company, certify and issue to the said Canal Company 1,595 of the said three thousand Bonds which are now to be made and shall also then certify and issue to the said Canal Company as many more of the said three thousand bonds as may be required to reimburse the said Canal Company; the balance to it then due for the expenditures by it made upon the railroads and property by the hereinbefore recited Indenture demised.

Outstanding bonds to be exchanged for new bonds.—And the said Trust Company shall also, from time to time, certify and issue any of the said Bonds, to them delivered, in exchange at par with an equal adjustment of interest, for the existing outstanding Mortgage Bonds of the said Railroad Company, which amounts in the aggregate to three million, four hundred and fifty thousand dollars ($3,450,000).

And the said Trust Company shall, as fast and as soon as any of the said existing Mortgage Bonds are thus taken up, cancel them and certify the fact to said Canal Company. And the said Trust
54 Company shall also, from time to time, certify and issue to the said Canal Company, any of the said Bonds, to them delivered by said Railroad Company for such amount as may be due to the said Canal Company for moneys expended pursuant to the provisions of the hereinbefore recited Indenture; and such bonds so to be issued to said Canal Company, shall be taken by said Canal Company at par, and all coupons thereof then past due shall be cut off and cancelled before such issue; and it is further provided and

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agreed that in every case of doubt or disagreement as to the amount of bonds so to be delivered by said Trust Company to said Canal Company, either of the parties hereto or the said Trust Company may bring the question before any competent Court of adjudication, and until such adjudication shall be finally made neither of said parties hereto shall be liable to any forfeitures, nor shall these presents or anything herein contained be impaired or made void by any omission to make, or cause to be made such delivery or such acceptance of bonds.

And it is further provided and agreed that there shall, at all times, be retained by the said Trust Company, an amount of said Bonds equal to the then outstanding amount of Mortgage Bonds heretofore issued.

Surrender of stock and issue of new certificates hereunder.—Third. That all the certificates for stock heretofore issued by said Railroad Company and now outstanding except the said certificates for 15,950 shares, shall be called in, and as fast as they are received new certificates shall be issued subject to the provisions of this agreement, but the said Railroad Company shall not be bound to guarantee or insure a compliance with such call.

Form of guarantee.—Fourth. That the said Canal Company shall indorse or stamp upon each Bond so as aforesaid, to be issued by the said Trust Company, a guarantee duly executed under its common seal, in the form following:

The President, Managers and Company of The Delaware and Hudson Canal Company, Hereby, for Value Received, guarantee the payment of the principal of and the interest upon the within bond.

And the said Canal Company shall also endorse or stamp upon the new certificate of stock, hereinbefore provided for a guarantee, duly executed under its common seal, in the form following:

The President, Managers and Company of The Delaware and Hudson Canal Company, Hereby, for Value Received, guar-
55 antees the payment of a semi-annual dividend of three and a half percent. upon the stock represented by the within certificate, to be paid on the first days of January and July in each year, until the Albany City Bonds, which were loaned to the Albany and Susquehanna Railroad Company, to the amount of one million of dollars, shall be paid, by the operation of the sinking fund provided for their payment, and thereafter the said Canal Company guarantees to pay upon said stock four and a half per cent. semi-annually on the same days, subject to the conditions and provisions of the lease made by said Railroad Company to said Canal Company, dated February 24th, 1870, and of an agreement supplemental thereto, dated the 7th day of March, A. D. 1876.

Guaranty to be subject to provisions of original lease.

Total amount of securities to be issued by lessor limited to $13,500,000.—Fifth. That the total amount of stocks and bonds to be issued by said Railroad Company shall never exceed in the aggre-

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gate thirteen millions, five hundred thousand dollars—but nothing in this agreement contained shall be construed as a waiver of the said Canal Company to have a new mortgage made and new bonds issued, in case of the maturity of the bonds by this agreement provided for, as provided in the hereinbefore recited Indenture.

Payment of Trust Company charges.—Sixth. That all the charges of said Trust Company and other expenses of administering the trust hereinbefore provided for, shall be paid by said Canal Company.

Original lease to stand.—Seventh. That all and singular the covenants, agreements and provisions in the aforesaid recited Indenture of February 24, 1870, contained, except so far and to such extent as they are changed, altered or modified by this agreement, shall be and remain in full force the same to all intents and purposes as though this agreement had not been made.

Eighth. That all and singular the covenants, agreements and undertakings hereinbefore contained, shall inure to the benefit of and be binding upon the successors and assigns of the respective parties hereto.

In Witness Whereof, this agreement is signed on behalf of The Albany and Susquehanna Railroad Company by its President, and its Common Seal is hereto affixed and attested by its Secretary, pursuant to a Resolution of its Board of Directors. And this agreement is also signed in behalf of The President, Managers and Company of The Delaware and Hudson Canal Company by its President, and its Common Seal is hereto affixed and attested by its Treasurer, pursuant to a Resolution of its Board of Managers, this, the
56 seventh day of March, in the year of our Lord, one thousand eight hundred and seventy-six.

[Seal The A. & S. R. C. Co.]

THE ALBANY AND SUSQUEHANNA RAILROAD COMPANY,
By J. H. RAMSEY, *President.*

Attest:
W. L. M. PHELPS, *Secretary.*

[Seal D. & H. Canal Company.]

THE PRESIDENT, MANAGERS AND COMPANY OF THE DELAWARE AND HUDSON CANAL COMPANY,
By THOS. DICKSON, *President.*

Attest:
J. C. HARTT, *Treasurer.*

COUNTY OF ALBANY, *ss:*

On the 7th day of March, A. D. 1876, before me came Joseph H. Ramsey, to me known and known to me to be the President of the Albany and Susquehanna Railroad Company, and the same person described in and who executed the foregoing instrument, and

[Marginal notes and number of each paragraph printed in red ink in copy.]

acknowledged to me that he executed the same as such President, and being by me duly sworn, did depose and say that he is such President, and that the seal to said instrument affixed is the common seal of said Company, and that he set the same thereto by authority of said Company and by like authority he signed the same; also before me came William L. M. Phelps, to me known and known to me to be the Secretary of said Company and the same person described in and who executed said instrument, and acknowledged to me that he attested and signed said instrument as such Secretary, and being by me duly sworn did depose and say that he resides in the City of Albany, and is such Secretary, and that he so attested and signed said instrument by authority of said Company.

JACOB G. RUNKEL,
Commissioner of Deeds, Albany, N. Y.

57 STATE, COUNTY AND CITY OF NEW YORK, *ss:*

Be it remembered that on this 10th day of March, in the year of our Lord, one thousand eight hundred and seventy-six, before me personally came Thomas Dickson, who being by me first duly sworn, did depose and say, that he is the President of The President, Managers and Company of The Delaware and Hudson Canal Company, and that as such he signed the foregoing instrument of writing for and on behalf of said Company, and that the seal thereto affixed is the common seal of said Company, and that J. C. Hartt is the Treasurer of said Company, and that the said seal was affixed to the foregoing instrument, and attested by the said Treasurer in deponent's presence, and that the said instrument was thus executed and is by this deponent acknowledged for and on behalf of said Company, as and for its act and deed for the purposes therein expressed, pursuant to a resolution of the Board of Managers of said Company.

THOS. DICKSON.

Sworn to and subscribed before me the day and year above written, witness my hand and official seal.

[SEAL.] JOHN A. PATTISON,
Notary Public, Kings Co.

STATE OF NEW YORK,
City and County of New York, ss:

I, William Walsh, Clerk of the City and County of New York, and also Clerk of the Supreme Court for the said City and County, being a Court of Record, do hereby certify that John A. Pattison has filed in the Clerk's office of the County of New York, a certified copy of his appointment as Notary Public for the County of Kings, with his autograph signature, and was at the time of taking the annexed, duly authorized to take the same, and that I am well acquainted with the handwriting of said Notary Public, and verily believe that the signature to the annexed certificate is genuine.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of the said Court and County the 10th day of March, 1876.

[SEAL.] WM. WALSH, *Clerk.*

58 EXHIBIT B.

A Word of Caution to Albany and Susquehanna Stockholders.

"It is understood that an effort is being made to secure authority from stockholders of the Albany and Susquehanna R. R. Co. to represent them in a suit to secure increased dividends from the D. & H. Co. If any authority is given there would quite likely be a responsibility therewith for a share in all legal expenses and other costs, and stockholders should be careful about assuming any share in such expense.

The lease under which the D. & H. Co. hold the A. & S. Road provides that the former Company shall pay 4½% *per cent.* semi-annually upon the stock of the A. & S. and the interest upon the bonded indebtedness of the latter company. In the event of the total disbursements per annum, on account of the lease, falling below $490,000 then the rate of interest upon the stock is to be increased to a sufficient extent to cover the difference.

The D. & H. Co. is preparing to retire the bonds of the A. & S. Company in the amount of $10,000,000 which is bearing 6 and 7 per cent. with a new issue bearing 3½ per cent. interest. However, when the old bonds are retired with the new, the D. & H. Co. will still be paying $315,000 interest on the $3,500,000 of stock of the A. & S. and $350,000 on new bonds or an aggregate sum of $665,000 per annum, which is considerable in excess of the minimum sum fixed by the lease. That the stockholders of the A. & S. should expect to share in the saving of interest by the reduced rate on the bonds so long as the cost per annum to the D. & H. does not fall below the specified sum of $490,000 seems unreasonable. That lawyers may seek a case is not unlikely, but stockholders will be wise in refraining to assume any share in expense or authorizing any one to act for them unless convinced, after a careful perusal of the lease, that there are reasonable expectations of succeeding."

59 EXHIBIT C.

To the Stockholders of the Albany and Susquehanna Railroad Company:

Notice is hereby given that a special meeting of the stockholders of the Albany and Susquehanna Railroad Company will be held at the office of the Company, 56 North Pearl Street, Albany, N. Y., on the seventh (7th) day of April, 1905, at 12 o'clock noon, for the purpose of considering and acting upon the following matters:

1. The consenting that the Company, in compliance with the request of The Delaware and Hudson Company under the terms of its lease of the property and franchises of this Company, shall make a mortgage upon its property and franchises to secure an issue of $10,000,000 three and one-half (3½) per cent. forty-year gold mortgage bonds of the Company, bearing interest from April 1, 1906, the payment of the principal and interest thereof to be guar-

anteed by The Delaware and Hudson Company, and shall deliver the said bonds to The Delaware and Hudson Company for the redemption of the $10,000,000 First Consolidated Mortgage Bonds of this Company maturing April 1, 1906; and that at the same time there shall be delivered to The Delaware and Hudson Company the agreement of this Company providing that whenever The Delaware and Hudson Company shall surrender to this Company any of the said new three and one-half (3½) per cent. forty-year gold mortgage bonds, this Company shall issue to The Delaware and Hudson Company in lieu thereof an equal amount at par of four (4) per cent. preferred shares of stock of this Company, preferred both as to principal and dividends, the payment of the latter to be guaranteed by The Delaware and Hudson Company, and that the bonds so surrendered shall be thereupon cancelled.

2. In case due consents shall have been given to the making of a new mortgage by the Company to secure the issue of its $10,000,000 three and one-half (3½) per cent. forty-year gold mortgage bonds to be delivered to The Delaware and Hudson Company for the redemption of the Company's $10,000,000 of bonds now outstanding, and to the making of an agreement for the exchange of such bonds upon the demand of The Delaware and Hudson Company for stock at par; then the authorizing of an increase of the Company's capital stock in the amount of $10,000,000, consisting of 100,000 shares of $100 each, and the use thereof at par in retiring an equal amount at par of the said new bonds upon the surrender of the same by The Delaware and Hudson Company for cancellation; or, if The Delaware and Hudson Company so elect, the issue of said stock at par in the first instance in lieu of such new bonds to The Delaware and Hudson Company for the redemption of the said outstanding bonds; *provided* that under no circumstances shall the aggregate amount of the stock and bonds of the Company outstanding at any time exceed the present amount of $13,500,000 at par.

3. In case an increase of the capital stock of the Company in the amount of $10,000,000 shall have been duly authorized, then the consenting that the same shall be issued as four (4) per cent. preferred stock, preferred both as to principal and dividends, the payment of the latter to be guaranteed by The Delaware and Hudson Company.

The books for the transfer of the Company's stock will be closed from the afternoon of March 17th until the morning of April 8, 1905.

By order of the Board of Directors.

ROBERT OLYPHANT, *President.*
W. L. M. PHELPS, *Secretary.*

Dated Albany, N. Y., March 15, 1905.

61 EXHIBIT D.

Albany & Susquehanna Railroad Company.

ALBANY, N. Y., *March* 15, 1905.

To the Stockholders of the Company:

Under date of February 24, 1870, this Company executed a lease of its franchises and property to The Delaware and Hudson Company. Thereafter this Company executed its First Consolidated mortgage of its franchises and property to The Farmers' Loan and Trust Company of New York, dated April 1, 1876, to secure bonds amounting to $10,000,000, of which $3,000,000 bear interest at the rate of seven (7) per cent. per annum and $7,000,000 bear interest at the rate of six (6) per cent. per annum. These bonds will mature on April 1, 1906.

By the terms of the said lease and of a supplemental agreement dated March 7, 1876, The Delaware and Hudson Company has guaranteed the principal and interest of these bonds and the payment of dividends upon the existing $3,500,000 of the capital stock of this Company at the rate of nine (9) per cent. per annum. The lease provided that if required by The Delaware and Hudson Company in order to protect the leased property and the capital stock of this Company from the consequences of foreclosure and sale at the maturity of the said bonds, this Company would issue in due form its new bonds payable at such times and in such manner as the Delaware and Hudson Company should require, or, at the option of The Delaware and Hudson Company, would issue stock therefor, and would deliver the said bonds or stock to The Delaware and Hudson Company to be negotiated and sold by it, the net proceeds arising therefrom to be applied to the payment of such maturing bonds; and that such new bonds or stock should be sufficient in amount to provide

62 by their net proceeds for the payment of the said maturing bonds; and that the payment of the principal and interest of such new bonds or of dividends upon such new stock should be guaranteed by The Delaware and Hudson Company.

In anticipation of the maturity of these bonds on April 1, 1906, The Delaware and Hudson Company has now requested this Company for the purposes aforesaid to issue and deliver to it $10,000,000 three and one-half (3½) per cent. forty year gold bonds of this Company, bearing interest from April 1, 1906, and secured by a new mortgage upon its property and franchises in satisfactory form, and at the same time to execute and deliver an agreement providing that whenever The Delaware and Hudson Company shall surrender any of said new bonds to this Company the same shall be cancelled and this Company shall issue to The Delaware and Hudson Company in lieu thereof shares of capital stock of equal par value, preferred as to principal and dividends, which latter shall be at the rate of four (4) per cent. per annum and shall be guaranteed by The Delaware and Hudson Company. On the other hand, if The Delaware and Hudson Company shall so elect, it is to have the right in the first in-

stance to take the $10,000,000 of preferred stock at par and to apply the proceeds thereof to the redemption of the said bonds maturing April 1, 1906.

The effect of the proposed arrangement will be, if the said bonds are so issued and used in the first instance, to reduce the rate of interest paid upon this Company's mortgage indebtedness of $10,000,000 from six (6) and seven (7) per cent. to three and one-half (3½) per cent. Should, however, The Delaware and Hudson Company take the said preferred stock, either originally, or later upon the surrender of the bonds issued, then the future interest would be at the rate of four (4) per cent., but the substitution of such stock would result in the extinguishment of all right to enforce by foreclosure and sale a mortgage lien upon the Company's property prior to any rights of the present stockholders, a right which the holders of mortgage bonds would always have, but which the holders
63 of the preferred stock would not have. In either case the situation of the present stockholders of this Company would be greatly improved, and in our opinion the offer of The Delaware and Hudson Company is in every aspect a favorable one for this Company and its stockholders, and the same therefore has been approved by this Board.

The Board of Directors deems it proper, that in view of the prevailing favorable financial conditions, arrangements should now be made in anticipation of the maturity of the existing and outstanding bonds on April 1, 1906, and the Board advises prompt action by the stockholders in accepting the proposition of The Delaware and Hudson Company.

The Board of Directors has therefore called a special meeting of the stockholders to vote upon the subject, as shown by the enclosed notice.

Stockholders approving of the course proposed, will please date, sign and promptly return the enclosed proxy.

Since the proposed action will require a vote of the holders of two-thirds of the entire capital stock of $3,500,000, stockholders will see the importance of a full vote to insure the redemption of the mortgage bonds which have a lien prior to their stock.

The books for the transfer of stock will be closed from the afternoon of March 17th until the morning of April 8, 1905.

By order of the Board of Directors.

ROBERT OLYPHANT, *President.*
W. L. M. PHELPS, *Secretary.*

64 EXHIBIT E.

Proxy.

Know all Men by these Presents, That the undersigned do..... hereby constitute and appoint Robert Olyphant, James H. Manning, George I. Wilber, Robert C. Pruyn and William L. M. Phelps and each or either of them, or a majority of them, attorneys and agents for the undersigned, and in the name, place and stead of the under-

signed, to vote as proxy at the special meeting of stockholders of the Albany and Susquehanna Railroad Company, to be held on April 7, 1905, upon all matters and business which may come before said meeting according to the number of votes the undersigned would be entitled to cast if then personally present, and especially upon the question of increasing the capital stock of the said Company by the issue of one hundred thousand additional shares of one hundred dollars each and upon the question of issuing said additional stock as preferred stock, and upon the question of authorizing the execution and delivery by said Company of a mortgage or deed of trust of its property and franchises in the amount of ten million dollars, conditioned as security for the payment of ten thousand bonds of one thousand dollars each to be issued by said Company.

Witness the hand and seal of the undersigned this — day of ——, one thousand nine hundred and five.

—— ——, [L. S.]

Be sure to date this proxy.

[Endorsed:] U. S. Circuit Court. Filed June 12, 1906. Southern District, New York. John A. Shields, Clerk.

65 *Demurrer.*

United States Circuit Court, Southern District of New York. In Equity.

ÆTNA INSURANCE COMPANY ET AL., Complainants,
against
ALBANY AND SUSQUEHANNA RAILROAD COMPANY and DELAWARE AND HUDSON COMPANY, Defendants.

66 The demurrer of the defendant The Delaware and Hudson Company to the bill of complaint of the Ætna Insurance Company and others, complainants:

This defendant, by protestation, not confessing all or any of the matters or things in said bill contained to be true in such manner and form as the same are therein set forth and alleged, demurs to the said bill and to each and every portion thereof, and for causes of demurrer shows that.

1. It appears by the complainants' own showing by the said bill that they are not, and no one of them is, entitled to the relief prayed by said bill against this defendant, and the said bill does not contain any matter of equity whereon this Court can ground any decree or give to the complainants, or any of them, any relief against this defendant.

2. The said bill is exhibited against this defendant for two distinct and independent matters and causes which have no relation to each other, in one of which the complainants, as stockholders of the defendant Albany and Susquehanna Railroad Company, suing in their own behalf and in behalf of all other stockholders thereof who may

join herein, seek to enforce in the right of their said corporation against this defendant certain alleged claims for unpaid rent belonging solely to said defendant Albany and Susquehanna Railroad Company, and in the other of which the complainants seek to recover of this defendant upon its direct guaranties of dividends made to each of the complainants separately upon the respective certificates of stock of the defendant Albany and Susquehanna Railroad Company held by the complainants. Said two distinct and independent matters and causes are improperly united in the said bill. The complainants sue in respect to said two distinct and independent matters and causes in diverse and distinct capacities.

67 3. So far as said bill alleges that this defendant has failed to fully perform its guaranty of increased dividends made to complainants, as holders of stock of the defendant Albany and Susquehanna Railroad Company, from and after the date of the extinguishment of the Albany City loan by operation of the sinking fund in respect thereto, it appears by the said bill that the complainants have a full, adequate and complete remedy at law, and that the same has not been exhausted so as to entitle them in any case to resort to a court of equity for relief.

4. So far as said bill alleges that this defendant has failed to pay to the defendant Albany and Susquehanna Railroad Company any part of the rent due under the provisions of Exhibit A annexed to the bill, the complainants show in said bill no capacity in themselves to maintain this suit, in that they do not show any prior demand made by them upon the defendant Albany and Susquehanna Railroad Company, its officers, directors or other stockholders, to take action in respect thereto, or any refusal of any such demand, nor do they show in said bill any legal or sufficient reason or excuse for dispensing with such prior demand; and also in that it does not appear from the said bill that all of the complainants were shareholders of the defendant Albany and Susquehanna Railroad Company at the time when it is alleged that this defendant first omitted to pay its full rent under the provisions of Exhibit A annexed to the bill, nor that the shares of such of complainants as were not shareholders at said time have since devolved upon them by operation of law.

5. So far as the said bill alleges that this defendant has failed to pay to the defendant Albany and Susquehanna Railroad

67½ Company any part of the rent due under the provisions of Exhibit A annexed to the bill, the complainants show by their said bill that they have been guilty of gross laches in the enforcement of their alleged rights in respect thereto, and show no excuse whatsoever for such laches. The said bill avers that this defendant has failed to pay over to the defendant Albany and Susquehanna Railroad Company as part of the alleged annual rent due to it, certain savings in annual interest upon a portion of the latter's bonded indebtedness effected prior to the year 1880, and ever since alleged to have been wrongfully retained by this defendant to its own use. The said bill further avers that a number of the complainants have been continuously holders and owners of stock of the defend-

ant Albany and Susquehanna Railroad Company for more than twenty-six years prior to the commencement of this suit.

THE DELAWARE AND HUDSON COMPANY,
By DAVID WILLCOX, *President.*

OPDYKE, LADD & BRISTOW,
Solicitors for said Defendant,
20 Nassau Street, New York, N. Y.

I hereby certify that the foregoing demurrer is, in my opinion, well founded in law.

WM. S. OPDYKE,
Counsel for the Defendant the Delaware and Hudson Company.

67¾ UNITED STATES OF AMERICA,
Southern District of New York, ss:

David Willcox, being duly sworn, says: That he is the president of the above named defendant the Delaware and Hudson Company, and that the foregoing demurrer is not interposed for delay.

DAVID WILLCOX.

Sworn to before me this 13th day of August, 1906.

THOS. J. CURRAN,
Notary Public (132), *N. Y. Co., N. Y.*

(Endorsed:) U. S. Circuit Court, Southern District of New York.—Ætna Insurance Company *et al.*, Complainant, *against* Albany and Susquehanna Railroad Company and Delaware and Hudson Company, Defendant.—Demurrer.—Opdyke, Ladd & Bristow, Attorneys for D. & H. Co., 20 Nassau St., New York City.—U. S. Circuit Court.—Filed Sept. 1, 1906.—Southern District of New York.—John A. Shields, Clerk.

Demurrer overruled with costs. Leave to defendant to answer in 20 days on payment of costs. October 26, 1906. G. C. H., *J.*—U. S. Circuit Court, Southern District of New York.—Filed Oct. 29, 1906. John A. Shields, Clerk.

68 At a Stated Term of the Circuit Court of the United States of America for the Southern District of New York, in the Second Circuit, held at the United States Court Rooms, in the Borough of Manhattan, in the City of New York, on the 26th day of October, in the year of our Lord one thousand nine hundred and six.

Present: Honorable George C. Holt, *Judge.*

In Equity.

ÆTNA INSURANCE COMPANY and others, Complainants,
against
ALBANY AND SUSQUEHANNA RAILROAD COMPANY and DELAWARE AND HUDSON COMPANY, Defendants.

The defendant Deleware and Hudson Company having demurred to the bill of complaint, and the cause having duly come on to be heard upon the said bill of complant and demurrer, after hearing Lewis E. Carr, Esq., of counsel for the said defendant Delaware and Hudson Company, in support of the demurrer, and Adrian H. Joline, Esq., and E. Parmalee Prentice, Esq., of counsel for complainants, in opposition thereto,

Now, on motion of Messrs. Howland, Murray & Prentice, solicitors for the complainants, it is

69 Ordered, that the said demurrer be and it is hereby overruled, with costs to the complainants, and that the said defendant Delaware and Hudson Company may answer the bill of complaint, upon payment of costs, within twenty days after the service upon the solicitors for the said defendant of a copy of this order, with written notice of entry thereof.

GEO. C. HOLT, *J.*

(Endorsed:) United States Circuit Court, Southern District of New York.—Ætna Insurance Company and others, Complainants, *against* Albany & Susquehanna Railroad Company and Delaware & Hudson Company, Defendants.—Order overruling demurrer and notice of settlement.—Howland, Murray & Prentice, Solicitors for Complainants, 35 Wall Street, New York.—Copy received, Oct. 31, 1906. Opdyke, Ladd & Bristow, Attorneys for deft. The Delaware & Hudson Co.—U. S. Circuit Court, Southern District of New York. Filed Nov. 2, 1906.—John A. Shields, Clerk.

70 *Answer of Defendant Albany and Susquehanna Railroad Company.*

United States Circuit Court, Southern District of New York.

AETNA INSURANCE COMPANY ET AL., Complainants,
against
ALBANY & SUSQUEHANNA RAIL ROAD COMPANY and DELAWARE & HUDSON COMPANY, Defendants.

Answer of the Albany and Susquehanna Rail Road Company to the above entitled Bill of Complaint.

The Albany & Susquehanna Rail Road Company, answering the above entitled bill of complaint says:

That it admits each and every allegation and charge in the said bill contained.

That in accordance with the by-laws of this company the annual meeting of its stockholders was held at the City of Albany on Tuesday, the 16th day of October 1906; that prior to the said meeting stockholders interested in the protection of the interests of this respondent issued a circular to all stockholders in the Albany & Susquehanna Rail Road Company asking their support in the election of a new board of directors which should be free from the control of the Delaware Company, and in support of this request the said circular referred to the present suit and to the position taken therein by the members of the board of directors of the Albany & Susquehanna Company opposing the interests of the stockholders in that company; and this respondent attaches hereto a copy of the
71 circular sent to stockholders as aforesaid, marking the same Exhibit 1.

That in response to this appeal Robert Olyphant, then the President of this respondent, issued a circular to stockholders in this company, a copy whereof is hereto attached marked Exhibit 2, and this respondent shows that in said circular the said Robert Olyphant stated that the management of the company wished to facilitate the judicial determination of the questions involved in the present action, and the said Olyphant then and at the same time requested stockholders in this respondent company to give their proxy at the approaching meeting to him, the said Robert Olyphant, David Willcox, Charles A. Peabody, George I. Wilber and Harrison L. Beatty.

That in reply to the foregoing circular, stockholders interested in the prosecution of the above entitled bill issued a circular, a copy whereof is hereto attached and marked Exhibit 3; that the said Robert Olyphant thereafter issued a further circular, a copy whereof is hereto attached and marked Exhibit 4; that in reply to the last named circular the stockholders interested in the prosecution of this action issued a further circular, a copy whereof is hereto attached and marked Exhibit 5, and that with the said last mentioned circular was sent to each stockholder in the Albany & Susquehanna Company, a copy of the demurrer filed in this action by the Albany & Susquehanna Company on the 29th day of September, 1906.

And this respondent alleges that stockholders interested in prosecuting this the above entitled action, in order further to present the existing situation to stockholders and to show to stockholders that the Delaware Company, although professing to desire a judicial determination upon the matters involved herein, nevertheless in fact presented serious obstacles to the progress of this litigation, communicated personally with as many stockholders as it was possible for them to reach, for this purpose sending their agents and
72 personally traveling to the residences of different stockholders in Michigan, throughout the state of New York, Pennsylvania, Connecticut, Rhode Island and Massachusetts; that prior to the filing of the original bill herein complainants had sought the support, assistance and co-operation of stockholders; that after the institution of this suit many stockholders in this respondent company were of opinion that the position taken herein by the Delaware Company and by the Susquehanna Company under its control did

not fairly represent the interests of the Susquehanna Company or of its stockholders; that in the contest for control of the annual meeting of stockholders in this company the only question presented to stockholders related to this litigation and the action of the Delaware Company and of the Susquehanna Company under its control herein; that at the said annual meeting there were cast in favor of the nominees of the Delaware Company 15,441 ballots; that there were cast in opposition to the said nominees 15,501 ballots, and this respondent therefore admits that at the time the original bill herein was filed the Delaware Company controlled the Board of Directors and a majority of the stock in this respondent company, but this respondent asserts that since the filing of the original bill herein and since the filing in the name of this company of the above mentioned demurrer to the original bill herein the Delaware Company has lost control of this respondent corporation.

ALBANY & SUSQUEHANNA RAIL ROAD COMPANY,
By HERBERT S. BARNES, *Solicitor.*

35 Wall St., New York City.

73 EXHIBIT I.

Albany and Susquehanna Rail Road Company.

Stockholders' Protective Committee.

To the Stockholders of the Albany and Susquehanna Rail Road Company:

This Committee has already informed the stockholders in the Albany and Susquehanna Railroad Company of their rights to largely increased dividends due from The Delaware and Hudson Company.

For many years The Delaware and Hudson Company has entirely controlled the Board of Directors of the Susquehanna Company. At the present time the Susquehanna Board is constituted as follows:

Names of directors of Susquehanna Company.	Position in Delaware & Hudson Co.
Robert M. Olyphant	Chairman and Director.
George I. Wilber	Director.
David Willcox	President.
R. Suydam Grant	Director.
Charles A. Peabody	Director.
William S. Opdyke	General Counsel.
Abel I. Culver	Second Vice-President.
Charles A. Walker	Treasurer.
Robert Olyphant	Represented on The Delaware and Hudson Board.
William L. M. Phelps	Employed by The Delaware and Hudson Company as Secretary of the Susquehanna Company.
Robert C. Pruyn	
James H. Manning	

74 The relations which Messrs. Manning and Pruyn bear to The Delaware and Hudson Company are not fully known to the Committee, but these gentlemen are nominees of The Delaware Company upon the Susquehanna Board.

It is essential for the protection of Susquehanna interests to elect at the coming Annual Meeting a new Board which shall act for the Susquehanna Company alone.

That the present Board is incapable of so acting appears from their action in the present controversy.

Last June the Aetna Insurance Company, of Hartford, and certain other stockholders in the Susquehanna Rail Road brought suit, by the Counsel for this Committee, against The Delaware and Hudson Company to collect the increased dividends owing upon Susquehanna stock. This suit is resisted by The Delaware and Hudson Company, acting through its President, Mr. Willcox, and its General Counsel, Mr. Opdyke, both, as appears from the foregoing list, being Directors of the Albany and Susquehanna Company. Among the various matters set up by these gentlemen in reply to the claim of the Aetna Insurance Company are the following:

That stockholders in the Susquehanna Company have "no capacity in themselves to maintain this suit"—in effect that the stockholders' rights must be asserted in the name of the Susquehanna Company by its Board of Directors;

Also, that the stockholders' rights have been lost by reason "of gross laches in the enforcement of their alleged rights in respect thereto."

In other words, these Directors of the Susquehanna Company set up their own neglect as a bar to the claims of the Susquehanna Company, while at the same time they insist upon continuing their control and excluding stockholders from any opportunity to assert their own rights.

75 The Committee, therefore, urgently request all stockholders in the Susquehanna Rail Road Company to execute and return the enclosed proxy as soon as possible.

New York, September 14, 1906.

JOHN HARSEN RHOADES,
ADRIAN H. JOLINE,
GEORGE P. BUTLER, Chairman,
Committee.

EXHIBIT 2.

The Albany and Susquehanna Railroad Company.

SEPTEMBER 20, 1906.

To the Stockholders of The Albany and Susquehanna Railroad Company:

The attention of the management of The Albany and Susquehanna Railroad Company has been called to the circular of the so-called "Stockholders' Protective Committee," consisting of Messrs. Rhoades,

Joline and Butler, dated the 14th day of September, 1906, and asking for proxies in their own favor for use at all stockholders' meetings of The Albany and Susquehanna Company held before November 1, 1909, a period of three years.

The stock books of this Company show no one of the members of this Committee to be a holder of its stock, although the firm of one of them appears to hold about 350 shares. Their interest, therefore, in The Albany and Susquehanna Company, so far as disclosed, seems to be merely that arising under the so-called "Deposit Agreement" of December 22, 1905, which provides that they shall receive not exceeding 15 per centum of the total amount of any benefit received by the depositing shareholders through the efforts of
76 the Committee, and that in estimating this total the Committee shall capitalize the increased future dividends on a 4 per cent. basis. The object, therefore, appears to be to extend the control they now have over such Albany and Susquehanna shares as have been deposited under the said Agreement, over the voting power of all the other shares of the Company.

After the lease of the Albany and Susquehanna Railroad to The Delaware and Hudson Company in 1870, the former directors of The Albany and Susquehanna Company were all continued in office until their several deaths or resignations. During this period no question of difference ever arose between The Albany & Susquehanna Company and The Delaware and Hudson Company. It was found convenient, from time to time, to fill the vacancies so occurring with gentlemen who would be able to attend the Board meetings. Although many of these gentlemen were officers or directors of The Delaware and Hudson Company, their character was such as to give assurance that by no act or omission upon their part would they sacrifice the interest of The Albany & Susquehanna Company to that of The Delaware and Hudson Company.

Some months ago, one or more members of the Protective Committee raised the claims in favor of The Albany and Susquehanna Co. which are referred to in the circular of the Protective Committee, with the President of The Delaware and Hudson Company, who suggested that the claims thus made, with the reasons supporting the same, be stated in writing, in order that the matter might be submitted to the Board of Managers of that Company. No such written statement was, however, so submitted. The Directors of this Company having learned of these facts, naturally supposed that those so asserting claims in behalf of this Company against The Delaware and Hudson Company would make known to the Board of Directors of this Company the reasons which were supposed to justify such
77 claims, even although they had been unwilling to do this fully with The Delaware and Hudson Company. The matter of these supposed claims was however never presented to the officers or Directors of The Albany and Susquehanna Company by the Protective Committee, but in June last a suit to enforce the said claims, was begun in the names of certain stockholders of The Albany and Susquehanna Company, by the members of the Committee, both against The Delaware and Hudson Company and The Albany and

Susquehanna Company, without any previous application to the Company to assert the claims on its own behalf or that of its stockholders.

The management of The Albany and Susquehanna Company is informed that The Delaware & Hudson Company has filed a demurrer to the Bill of Complaint in this suit, mainly upon the ground of the improper joinder of a cause of action existing in favor of The Albany and Susquehanna Company itself, with a cause of action existing solely in favor of the shareholders of The Albany and Susquehanna Company, and that it was in connection with this technical distinction, that the language quoted in the circular of the Protective Committee occurred; so that the position of The Delaware and Hudson Company was in fact that the shareholders alone, and not the Company, could maintain the suit brought so far as it sought to collect "the increased dividends owing upon the Susquehanna stock," referred to in the said Committee's circular. The statement of this circular is therefore misleading in this respect.

The shareholders of this Company need have no doubt that the Directors who have had their confidence for so many years will do all that is necessary to protect all the rights of the shareholders. The questions raised by the Protective Committee, being urged with apparent confidence by gentlemen of position and standing constituting the Protective Committee, must undoubtedly receive a judicial determination. The present management of the Company desires
78 not only to throw no obstacle in the way of such a decision in proper form, but wishes to facilitate the same in every proper way for the equal advantage of each shareholder. They naturally resent, however, the unfair criticism which they find in the Committee's circular and in the Bill of Complaint in the suit already instituted.

Therefore, they appeal with confidence to the stockholders to sign and return to the Secretary of the Company the enclosed proxy, for one year only, in favor of the five gentlemen named therein, who together hold or directly represent about 9,000 shares of the stock of the Albany and Susquehanna Company.

Respectfully, ROBERT OLYPHANT, *President.*

The Albany and Susquehanna Railroad Company.

ALBANY, *September* 20, 1906.

For the convenience of stockholders who may not attend the Annual Election, to be held at the office of the Company, No. 56 North Pearl Street, Albany, N. Y., on Tuesday, the 16th day of October, next, a form of proxy is enclosed; the persons named therein being directors of the above Company, viz.: Robert Olyphant, David Willcox, Charles A. Peabody, George I. Wilber and Harrison L. Beatty.

Very respectfully, W. L. M. PHELPS, *Secretary.*

79 EXHIBIT 3.

Albany and Susquehanna Rail Road Company.

Stockholders' Protective Committee.

To the Stockholders of the Albany and Susquehanna Railroad Company:

Mr. Robert Olyphant, son of Mr. Robert M. Olyphant, Chairman and ex-President of the Board of Directors of The Delaware and Hudson, against which Company this Committee is pressing the claims for rental explained to you in its former circulars, has, as President of the Albany and Susquehanna Company, addressed you a circular dated September 20th.

In this circular Mr. Olyphant endeavors to dissuade you from giving your proxy to this Committee, and asks your proxy for himself and four other gentlemen, three of whom are directors of The Delaware and Hudson Company.

If you are not in sympathy with the claim of the Protective Committee for the collection of unpaid rentals and for increased dividends, or if your dominating interest is with The Delaware and Hudson Company, we cannot of course hope for your support; but Mr. Olyphant's request for your proxy, for the purpose of continuing the control of the Albany and Susquehanna Company by The Delaware and Hudson Board while the Susquehanna Company is suing The Delaware and Hudson Company, is contrary to common sense.

We cannot understand why The Delaware and Hudson directors should insist upon continuing their control of the Albany and Susquehanna except for the purpose of protecting The Delaware and Hudson Company. We do not regard Mr. Olyphant's statements as sincere; and in spite of the assurances which he gives us regarding the character of The Delaware and Hudson directors, we be-
80 lieve that they are no exception to the rule that no man can serve two masters.

Mr. Olyphant's circular is misleading throughout. We call attention to the following particulars:

1. The alarm which Mr. Olyphant seeks to create by emphasizing in italics that the proxy asked for by us in our circular of September 14th, is for *a period of three years,* while that subsequently sought for by him is *for one year only,* should be allayed by noticing that our proxy reads "or until the sooner revocation hereof." This Committee requested your proxy for three years to cover the delays now being interposed by The Delaware and Hudson directors, but whenever you are convinced that this Committee is delaying the prosecution of your claims, against the earnest endeavors of The Delaware and Hudson directors to prosecute the suit which they have thus far failed to institute, you have full power to transfer your support to Mr. Olyphant or others.

2. In urging you to withhold your proxy from this Committee, Mr. Olyphant says:

"The stock books of this Company show no one of the members of this Committee to be a holder of the stock, although the firm of one of them appears to hold about 350 shares. Their interest, therefore, in the Albany and Susquehanna Company, so far as disclosed, seems to be merely that arising under the so-called Deposit Agreement."

Mr. Olyphant has evidently made no endeavor to ascertain and present to you the facts. If he had, he would know that Mr. Rhoades is trustee of the estate of the late Isaac N. Phelps, whose trustees and beneficiaries hold about 3,000 shares of stock now deposited with this Committee, and that Mr. Willcox, President of The Delaware and Hudson, was informed of these holdings by counsel of this Committee in a letter dated December 14,
81 1905, and acknowledged by Mr. Willcox on that date. That at the same time the Chairman of the Committee called on Mr. Willcox and informed him that aside from smaller holdings he had had placed in his hands with full authority to act in this matter 1,000 shares of stock held by Mr. John S. Kennedy, whose stock is now also deposited with this Committee.

These substantial holdings were the basis for the formation of this Committee; but in view of the concentrated holdings in The Delaware and Hudson interest the Committee must look for support both as to deposit of stock and for proxies to the holders of 50 shares or less who constitute in number a large majority of the stockholders.

The Committee has already pointed out to you that the directors of the Albany and Susquehanna who are also directors of The Delaware and Hudson control a large amount of stock which we believe to be fully 9,000 shares as stated in Mr. Olyphant's circular. *4,500 shares of this stock however belong to The Delaware and Hudson Company itself.* We cannot see why these gentlemen ask you to make them your representatives in the prosecution of the suit against The Delaware and Hudson Company because they represent shares owned by the defendant company itself. Mr. Olyphant's circular makes no reference to the character of this holding.

3. We presume it is in reply to our contention that The Albany and Susquehanna directors, being also charged with the protection of The Delaware and Hudson Company's defense, are disqualified to prosecute the Susquehanna Company's claim, that Mr. Olyphant says:

"* * * the character of these gentlemen [the directors] was such as to give assurance that by no act or omission upon their part would they sacrifice the interest of the Albany and Susquehanna Company to that of The Delaware and Hudson Company."
82 And again:

"The shareholders of this Company need have no doubt that the directors who have had their confidence for so many years will do all that is necessary to protect all the rights of the shareholders."

In this regard it may be well to recall that these same gentlemen in March, 1905, requested, in view of that confidence which you had always reposed in them, your proxies for the purpose of authorizing an increased issue of $10,000,000 of Albany and Susquehanna stock. This issue would have resulted in placing the control of your Company absolutely in the hands of The Delaware and Hudson Company, and would have transferred from the present stockholders to The Delaware and Hudson Company nearly three-quarters of any recovery made under the claim your Committee is pressing. The Albany and Susquehanna directors withdrew from this course only when counsel employed by the Depositors in this Committee called their attention to the following initial provision of the Supplemental Contract with the Delaware and Hudson Company and the fact that the contract was referred to by endorsement on each certificate of stock:

"The total amount of the capital stock of the said Railroad Company shall be and the same is hereby fixed and limited to the sum of $3,500,000."

Whether these gentlemen asked your authority in ignorance of this provision, or with knowledge of it sought to deprive you of its benefits, their action in that regard reflects no more credit on their sagacity or integrity than does their endeavor to watch the affairs of the Albany and Susquehanna Company with an eye single to your interests while they remain directors of The Delaware and Hudson, or than does their failure for many years to collect or even
83 claim the rental owing to you, or than does their present anxiety to have the defendant in this action select and direct counsel for the plaintiff.

4. The circular issued by this Committee on September 14, 1906, has already informed you that one of the defenses which The Delaware and Hudson advances is that the Susquehanna Company has lost its rights by the neglect of its Management.

The only attempt which Mr. Olyphant makes to justify the action of the gentlemen who put forward this defense is to assert that "some months ago" the request was made that the claims which the Protective Committee now urge "with the reasons supporting the same be stated in writing in order that the matter might be submitted to the Board of Managers of that [The Delaware and Hudson] Company." Mr. Olyphant now says: "No such written statement was however so submitted."

A written statement was furnished to Mr. Willcox in a letter written to him on December 14, 1905, and acknowledged by him on that date with the statement: "I will submit the matter to the Board in due course."

In view of The Delaware and Hudson's control of the Albany and Susquehanna Company and the proverbial delays of the law it must be evident to you that this Committee will need all the support to be given it by each stockholder.

We therefore urge you if you have not already done so in reply to

our former circular, to sign the enclosed proxy and return to us in the enclosed stamped envelope at your earliest convenience.

New York, September 25, 1906.

JOHN HARSEN RHOADES,
ADRIAN H. JOLINE,
GEORGE P. BUTLER, *Chairman,*
Committee.
CHARLES F. COANEY,
Secretary, 35 Wall Street, New York.

84 EXHIBIT 4.

The Albany and Susquehanna Railroad Company.

OCTOBER 1, 1906.

To the Stockholders of The Albany and Susquehanna Railroad Company:

The circular put forth by the Stockholders' Protective Committee under date of September 25, 1906, requires little answer as it has in general been covered by the circular previously issued by the undersigned.

1. With reference to the insinuation that a statement of the claim of the stockholders in the premises has ever been presented to The Albany and Susquehanna Company, the undersigned learns upon inquiry that upon December 13th and 14th, 1905, Mr. E. W. Sheldon, one of the counsel to the Stockholders' Committee, wrote two letters addressed to Mr. David Willcox as President of The Delaware and Hudson Company, asserting claims against the latter Company, but containing no statement of the full grounds of complaint or argument in support of the same. Mr. Willcox, as such President, replied asking that, in accordance with the practice usual in such cases, the grounds of the claim and the arguments in support of it, be stated with fullness so that the matter could be submitted to counsel; adding, "If you feel you can add nothing to the letters already written, I will submit the matter to the Board in due course," meaning necessarily the Board of Managers of The Delaware and Hudson Company. Thereafter Mr. Sheldon wrote that he would "be glad to comply with your request by laying before you some of the reasons why I cannot accept your contention," and subsequently requested various papers and statements of the facts. These were furnished to him upon January 6, 1906, but nothing was heard from Mr. Sheldon and suit was instituted without anything further from him. It will be observed that this correspondence was ad-
85 dressed to The Delaware and Hudson Company and that no formal statement of the claim has ever been furnished to even that Company, so that the italicized paragraph on the last page of the Protective Committee's circular contains a misleading quotation from Mr. Willcox's letter of December 14, 1905.

In addition Mr. Willcox was not an officer of the Albany and Susquehanna Company and the letter stating that he would submit the

matter to the Board referred in terms to the Board of Managers of The Delaware and Hudson Company. It is clear, therefore, that the claim has never been presented in any manner to the officers of the Albany and Susquehanna Company or any action requested upon their part, and the insinuation that they have neglected any duty in the premises is wholly without foundation.

2. With reference to the suggestion which was made about a year and one-half ago that when the consolidated bonds were refunded they should be ultimately replaced by stock of the Albany and Susquehanna Company, it is sufficient to say that that matter has no present importance. The suggestion was that a fixed obligation should be exchanged for stock of the Company. The management of the Albany and Susquehanna Company believed and still believe that it is good policy to issue stock to take up fixed obligations and that such course did not violate the terms of the supplemental lease. No such claims as those now asserted by the Protective Committee have ever been suggested by anyone; but, in any case, the course proposed would not have deprived the existing stockholders of any rights in the premises because the rights of the new stock were to be strictly limited as to dividends. A considerable majority of the stockholders of the Albany and Susquehanna Company agreed with the management in the view that it was sound policy to replace the bonds by stock. When, however, it became evident that some of the stockholders objected, the suggestion was withdrawn, and
86 the desire of the management to comply with the wishes of all the stockholders was fully shown.

3. The Protective Committee evidently appreciated the force of the criticism that they were not actual stockholders inasmuch as since the issue of the former circular of the undersigned, a few shares of stock have been transferred to the name of each member of the Committee.

4. It is hardly necessary to repeat that the claims alleged to exist in favor of your Company and its shareholders must be submitted to the courts, and that any board of directors of your Company necessarily will co-operate to have that done in a proper manner, and that the counsel of the Protective Committee will have full opportunity to be heard. The benefits of any decision in favor of such claims, will be shared *pro rata* by each shareholder of your Company irrespective of whether or not he has deposited his stock with the Protective Committee.

ROBERT OLYPHANT, *President.*

EXHIBIT 5.

Albany and Susquehanna Rail Road Company.

Stockholders' Protective Committee.

NEW YORK, *October*, 9, 1906.

To the Stockholders of the Albany and Susquehanna Rail Road Company:

On October 1st Mr. Olyphant addressed you his last circular, urging you to withhold your proxies from us, and said:

"It is hardly necessary to repeat that the claims alleged to exist in favor of your company and its shareholders must be sub-
87 mitted to the courts, and that any board of directors of your company necessarily will co-operate to have that done in a proper manner, and that the counsel of the Protective Committee will have full opportunity to be heard."

It is only fair that you should know that on the same date on which Mr. Olyphant signed his circular he signed the demurrer of the Albany & Susquehanna Company in the suit brought by the Ætna Insurance Company, through Counsel for this Committee, against the Delaware & Hudson for the increase of your dividends. A copy of the demurrer is enclosed, and shows clearly the real attitude of obstruction and opposition by the Albany and Susquehanna Board and Mr. Olyphant, its President, against claims urged in behalf of their shareholders.

The meeting for the election of directors is to be held on October 16th. Your proxy should be in our hands at the earliest possible moment. If you have already given your proxy to the present management, it can be revoked by a proxy given now to the Protective Committee.

Yours very truly,

JOHN HARSEN RHOADES,
ADRIAN H. JOLINE,
GEORGE P. BUTLER,
Chairman, Committee.
CHARLES F. COANEY,
Secretary, 35 Wall Street, New York.

[Endorsed:] U. S. Circuit Court. Filed Nov. 3, 1906. Southern District, New York. John A. Shields, Clerk.

88 *Amended Answer of Defendant Delaware and Hudson Company.*

United States Circuit Court, Southern District of New York. In Equity.

AETNA INSURANCE COMPANY ET AL., Complainants,
against
ALBANY & SUSQUEHANNA RAILROAD COMPANY and DELAWARE & HUDSON COMPANY, Defendants.

Amended Answer of the Delaware and Hudson Company, Defendant.

The Delaware and Hudson Company, made a party defendant under the name of "Delaware & Hudson Company" in the bill of complaint of Aetna Insurance Company, Connecticut Trust & Safe Deposit Company, trustee, &c., Security Company, trustee, &c., Atwood Collins, executor, &c., Francis R. Cooley, Charles P. Cooley and Melancthon W. Jacobus executors, &c., Jonathan B. Bunce, Drayton Hillyer and Archibald A. Welch, trustees, &c., John R. Redfield, trustee, &c., Atwood Collins and John R. Redfield, trustees, &c., John D. Browne, Lucius A. Barbour and Francis Parsons, trustees, &c., Mary Danesi, Fanny M. Barclay, Rhode Island Hospital Trust Company, trustee, &c., and Howard O. Sturges, William L. Hodgman and Herbert J. Wells, trustees, &c., against this defendant and The Albany and Susquehanna Railroad Company, sued as Albany & Susquehanna Railroad Company, now and at all times hereafter saving to itself all and all manner of benefit of exception or otherwise that can or may be had or taken to the
89 many errors, uncertainties and imperfections in the said bill of complaint, and at all times protesting that this Honorable Court has not jurisdiction of the suit instituted by the filing of the said bill of complaint; and further protesting that this Court should not entertain the said bill of complaint inasmuch as the same unites two distinct and separate alleged matters and causes which have no relation to each other, and as to which separate and independent claims are respectively asserted in diverse and distinct capacities, and further protesting that as to one of the said matters and causes the complainants have full, adequate and complete remedy at law which has not been exhausted, for answer thereto, or to so much thereof as this defendant is advised that it is material or necessary for it to make answer to, answering says:

FIRST. *To so much of the said bill of complaint as alleges matters equally pertinent, if not all pertinent, to both causes of action alleged by the bill this defendant answering says:*

This defendant admits that both it and its co-defendant The Albany and Susquehanna Railroad Company (hereinafter in this answer called the "Susquehanna Company"), are corporations organized and existing under the laws of the State of New York, and

that the allegations of the said bill of complaint respecting the organization of the said Susquehanna Company, its capitalization, the construction of its railroad, the making of its mortgage bonds and the loan to it of $1,000,000 of bonds of the City of Albany are substantially correct, but this defendant craves leave to refer upon the trial of this suit to the originals of the mortgages securing the payment of all the said bonds, for greater certainty as to the terms thereof. This defendant was created such corporation under the name of "The President, Managers and Company of the Delaware and Hudson Canal Company" by an act of the legislature of the State of New York passed April 23, 1823, being Chapter 238 of the Laws of 1823; and its corporate name was changed by an act
90 of the said legislature passed April 28, 1899, to "The Delaware and Hudson Company." It acquired power to lease railroads under Chap. 841 of the Laws of 1867 of the said State.

This defendant does not know, and cannot set forth as its belief or otherwise, whether or not it is the fact that the several complainants are respectively the holders of the amounts of shares of the capital stock of its co-defendant the Susquehanna Railroad Company alleged in their said bill of complaint in that behalf; or whether or not it is the fact that the several complainants have been holders of such shares of stock for the respective periods of time set forth in their said bill of complaint; and, therefore, this defendant leaves the complainants to make such proof thereof as they shall be advised.

This defendant admits for the purpose of this suit, that the respective citizenship and residence of the several complainants are correctly set forth in the said bill of complaint.

This defendant admits that on February 24, 1870, there was made between itself and its said co-defendant, the Susquehanna Company, a Lease of the railroad and railroad property of the said Susquehanna Company to this defendant; and that on March 7, 1876, a Supplemental Contract modifying the aforesaid Lease was made between the said two defendants, substantially correct copies of which Lease and Supplemental Contract are annexed to the said bill of complaint as "Exhibit A"; but this defendant for greater certainty as to the exact wording of the said Lease and Supplemental Contract prays leave to refer to the originals thereof upon the trial of this suit. This defendant denies, however, that the meaning and effect of the said Lease and of the said Supplemental Contract are correctly set forth in the said bill of complaint.

This defendant denies that on the 18th day of December, 1905, or at any other time it caused to be published a statement, of which an alleged copy is attached to the said bill of complaint and
91 marked "Exhibit B," or that it knew anything as to such statement until after the publication thereof. Such statement did not correctly set forth the views of this defendant as to the controversy therein referred to.

SECOND. *To so much of the said bill of complaint as alleges or claims that this defendant has failed to pay to its co-defendant, the Susquehanna Company, any of the rental at any time owing by this*

defendant to its said co-defendant under the terms of the said Lease and Supplemental Contract, this defendant further answering says:

At the time when the aforesaid Lease by the Susquehanna Company to this defendant was made, to wit, on February 24, 1870, the railroad of the Susquehanna Company covered by the said Lease had been in operation for a little more than a year, and its construction and equipment were both incomplete in many respects. The Susquehanna Company had then issued only $2,212,600 at par of its capital stock, including large amounts subscribed for by the towns and other municipalities along its line and including $95,000 of stock which had been issued to certain subscribers upon the payment in cash of ten per centum of their subscriptions, hereafter in this answer more fully mentioned, for $950,000 of its capital stock. The said Company had then issued $1,000,000 of its first mortgage seven per cent. bonds, $2,000,000 of its second mortgage seven per cent. bonds, and $186,000 (and no more) of an authorized issue of its $500,000 third seven per cent. mortgage bonds. It had received as a loan from the City of Albany $1,000,000 of the six per cent. Bonds of that city, and had secured the payment of the principal of the said bonds and of six per cent. annual interest thereon together with an annual contribution of one per centum thereon toward a sinking fund for the payment of the said bonds, by a mortgage having an equal lien with its first mortgage. Its net earnings from its railroad were not sufficient to pay its fixed charges, and it had a considerable floating debt and was also in urgent need of funds to enlarge both its equipment and railroad facilities, as well as to
92 pay the cost of an expensive litigation. The prospect of paying dividends upon its stock was very remote.

In this situation the Susquehanna Company entered into negotiations with this defendant for a long lease of its railroad upon a basis which should provide for the payment of all the fixed charges upon the railroad property, including taxes imposed upon the demised railroad property and effects or upon the business done upon the leased railroad, and yield over and above the same an amount equal to seven per cent. dividends upon the capital stock of the Susquehanna Company. It was arranged that the Susquehanna Company, for the purpose of paying its floating debt, should be at liberty to issue the remaining $314,000 of the issue of $500,000 of its third mortgage bonds, and to issue an additional amount of $287,400 of its capital stock which would make its total capital stock $2,500,000; thus making its then annual fixed charges, including the payments under its mortgage to the City of Albany, $315,000 and its dividend fund $175,000, the two amounts aggregating $490,000. It was further arranged that this defendant as lessee should guarantee to the holders of the outstanding bonds of the Susquehanna Company, and of its bonds thereafter issued, the payment of the interest thereon, according to their terms, but not the payment of the principal thereof; and should also guarantee to the holders of the shares of stock of the Susquehanna Company at any time outstanding the payment of 3½ per cent. semi-annual dividends thereon; and should pay such interest and dividends to such bondholders and stock-

holders directly by way of payment of the aforesaid rental. It was further arranged that this defendant should pay directly to the Susquehanna Company $1,000 annually to defray the cost of maintaining the corporate existence of the said Company. It was also arranged that this defendant, the lessee, should from time to time make needed improvements upon the leased railroad, and should receive in payment of the cost of such improvements new issues of bonds or stock of the Susquehanna Company at par up to
93 such amount as would make its total capitalization and mortgage debt not over $15,000,000, and that thereafter the cost of all further improvements made by the defendants should be borne by this defendant itself.

Thereupon the said Lease of February 24, 1870, was made and entered into between this defendant and the Susquehanna Company, and this defendant entered upon the leased premises on the 1st day of March, 1870. Thereafter until March 7, 1876, this defendant fully and duly paid to or for the account of the Susquehanna Company all and every part of the rental required to be so paid by this defendant under the terms of the said Lease; and ever since the making on March 7, 1876, of the so-called "Supplemental Contract" between this defendant and the Susquehanna Company, this defendant has fully and duly paid to the Susquehanna Company or for its account all and every part of the rental required by the terms of the said Lease and Supplemental Contract; and this defendant expressly denies each and every allegation of the bill that this defendant has ever failed to pay all and every part of such rental. No complaint has ever been made to this defendant by the said Susquehanna Company that this defendant had in any respect failed fully to pay all of said rental, and no demand has ever been made of this defendant by the said Susquehanna Company for the payment of any further amounts by way of rental under the said Lease or Supplemental Contract, or for any accounting in respect thereto.

It is not true as alleged in the bill of complaint that this defendant in and by the said Supplemental Contract agreed to pay annually as rental for the demised property the sum of $560,000 in addition to paying interest upon all the bonds of the Susquehanna Company which should be issued as provided by the Supplemental Contract. Neither is it true that in the original Lease this defendant had agreed to pay annually after January 1, 1871, a minimum rental of $490,000 and in addition thereto interest or dividends of
94 seven per cent. upon all new securities of the Susquehanna Company which should be issued under the provisions of the Lease for additions or enlargements. The provisions of the original Lease which are quoted in the bill of complaint required this defendant to make only the following payments by way of rental: three per centum semi-annual interest on $1,000,000 Albany City Bonds together with contributions of $5,000 semi-annually to a sinking fund established for the payment of the said Bonds; 3½ per cent. semi-annual interest on not exceeding $3,500,000 of the lessor's bonds issued or to be issued under its first, second and third mortgages theretofore made; 3½ per cent. semi-annual

dividends upon not exceeding $2,500,000 of the lessor's capital stock; which payments of interest and dividends were to be made directly to the respective bondholders and stockholders, but until all the said $3,500,000 bonds and $2,500,000 stock had all been actually issued, an amount equal to the interest and dividends upon any of such bonds or stock not so issued, was to be paid directly to the Susquehanna Company. These provisions of the said Lease so quoted, did not in terms or in effect provide that any payments, by way of rental or otherwise, should be made by this defendant to the Susquehanna Company, after its existing $3,500,000 bonds had been paid, in lieu of the $245,000 theretofore required to pay the annual interest upon the said existing bonds; it not being intended that these bonds should be paid by the Susquehanna Company itself or from the rentals, but that the same should be redeemed by a new issue of its bonds, the interest on which should be guaranteed and paid by this defendant; and full provision as to this was made by other portions of the said Lease, which provisions will be referred to later in this answer.

After this defendant entered into possession of the demised property under the Lease, the Susquehanna Company disposed of and issued the remaining $314,000 of its third mortgage Bonds, and also disposed of and issued the $287,400 of its capital stock necessary to make its total capital stock $2,500,000; and thereafter this defendant guaranteed and paid the interest and dividends upon
95 such bonds and stock to the holders thereof, having before paid the amount thereof directly to the lessor. In May, 1871, this defendant converted $50,000 of the third mortgage or equipment Bonds of the Susquehanna Company held by this defendant into 500 shares of the capital stock of the Susquehanna Company, thus making the total issue of the capital stock of the Susquehanna Company $2,550,000, the total mortgage issue being reduced to $3,450,000, and thereafter this defendant paid interest and dividends upon the said amounts respectively.

The other portions of the original Lease, before in this answer referred to, provided that when any of the said $3,500,000 bonds of the Susquehanna Company, secured by its then existing mortgages should mature, new bonds or stock should be issued by the Susquehanna Company to pay or redeem its said bonds, and that this defendant should thereupon endorse upon any new bonds or stock a guaranty of the payment of the interest or dividends called for by the same, without prescribing what should be the rate of interest upon any new bonds so issued, whether greater or less than 7 per cent.; thereby clearly substituting the obligations of these new guarantees for the prior obligation to pay, by way of rental, the interest upon the former bonds redeemed by the proceeds of the new guaranteed securities. These provisions are the only provisions of the said original Lease which imposed upon this defendant any obligation to pay by way of rental, after the maturity and payment of the $3,500,000 bonds secured by mortgages of the Susquehanna Company made prior to February 24, 1870, any amounts in addition to seven per cent. dividends upon the lessor's stock, except in respect

to new securities issued for betterments and the aforesaid $1,000 annual payment.

The Lease having provided in terms for the part payment for such betterments by the issue of 9,500 shares of the stock of the Susquehanna Company upon the payment of the unpaid ninety per centum of the existing subscriptions therefor, and it appearing that
96 950 of the said shares had already been issued as full paid shares to the subscribers, who had paid ten per centum, or $95,000, upon such subscription, as before in this answer set forth, it was arranged between the Susquehanna Company and this defendant that this defendant should receive the remaining 8,550 of such 9,500 shares as full paid stock in payment of expenditures made by it for improvements on the railroad to that amount. This defendant thus received the said shares, but no dividends were required thereon until 1876.

Thereafter and before July 26, 1872, this defendant had expended the amount of $1,595,000 in improvements upon the demised property, in addition to the amount of $855,000 which had been paid for in shares of capital stock as aforesaid. The Susquehanna Company thereupon issued to this defendant, under the provisions of the Lease, in payment for such expenditures the additional amount of 15,950 shares of its capital stock before it had formally made any increase of its capital stock beyond the amount of $4,000,000, so that the issue of some of the said 15,950 shares afterwards appeared to be without authority of law.

This defendant after July, 1872, continued to make expenditures in improving the demised property, and under the terms of the Lease was entitled to receive new bonds or stock of the Susquehanna Company for the amount thereof, but prior to the year 1876 no plan had been devised by which any satisfactory issue of such securities could be made. It was known that the $450,000 outstanding third mortgage bonds of the Susquehanna Company would mature on May 1, 1881, its $2,000,000 second mortgage bonds on October 1, 1885, and its $1,000,000 first mortgage bonds on July 1, 1888; and it seemed expedient that a consolidated mortgage issue should be arranged, sufficient in amount to supply the fresh money which would be needed for improvements as well as to refund the then outstanding mortgage bonds at or before their respective maturities. Meanwhile other questions had arisen between the Susquehanna Company and this defendant as to the construction of various
97 clauses of the Lease of February, 1870, among others, as this defendant believes, being a question as to whether this defendant would be obliged to continue the payment of $70,000 of the rental then paid, after the $1,000,000 Albany City Bonds had been paid through the operation of the sinking fund established for that purpose, to which fund annual contributions were to be paid as part of the rental under the said Lease, and a question as to the rates of interest to be fixed for any additional bonds which would have to be issued for improvements and to refund the old bonds. In seeking to arrange these matters, this defendant, on the one hand, desired that there should be abrogated the preference given by the terms of the Lease to the $2,500,000 of capital stock and the $3,-

500,000 of mortgage Bonds named in the Lease over any bonds or stock subsequently issued, in order to give greater value to any new mortgage securities; and the Susquehanna Company desired on the other hand to make plain, what was before doubtful, that the annual payment of $70,000 in respect to the Albany City Bonds, should be continued after the said bonds were paid through the contributions to the sinking fund, and that this should be done by increasing the guaranteed dividends to nine per cent. annually, and further that the said 15,950 shares of stock should be exchanged for bonds.

Accordingly on March 7, 1876, a new agreement was made between the Susquehanna Company and this defendant, being the agreement referred to in the bill of complaint as the "Supplemental Contract." When this Supplemental Contract was made the Susquehanna Company still remained under the same management as that which existed in 1870 when the original lease was made, Mr. J. H. Ramsey, who had been President of the Susquehanna Company from September 1, 1864, being still the President of that Company, with substantially the same Board of Directors which made the original Lease, and its terms were decided only after considerable negotiation.

98 This contract was submitted to and ratified by the stockholders of the Susquehanna Company on April 25, 1876, by the unanimous vote of more than two-thirds of the stockholders represented at such meeting. This contract recited that questions had arisen as to the construction of the Lease and as to the rights and liabilities of the parties thereunder and also as to the legality of the issue of 15,950 shares of the stock of the Susquehanna Company, and that both parties desired to have all such questions and the rights and liabilities of the parties under the Lease definitely settled.

This Supplemental Contract provided substantially as follows:

1. The stock of the Susquehanna Company was fixed at and limited to the sum of $3,500,000, to be represented by 35,000 shares of $100 each, upon which this defendant should guarantee and pay upon the first days of January and July in each year to the holders thereof a semi-annual dividend of 3½ per cent. The provision of the Lease giving a preference to 25,000 shares of stock in case of foreclosure was abrogated. In consideration thereof, after the $1,000,000 of the Albany City bonds issued to the Susquehanna Company "shall, by the operation of the sinking fund provided for "the payment of said bonds, be paid, the amount, to wit, the sum "of seventy thousand dollars a year, which the Delaware Company "(this defendant) will thus be relieved from paying into the sink-"ing fund and upon said bonds, shall thereafter be added to the "dividends to be paid to the stockholders, thus making the divi-"dends to be paid by said Delaware Company, after the Albany "City bonds are paid as aforesaid upon the said 35,000 shares here-"inbefore provided for, 9 per cent. instead of 7 per cent. per annum, "to be paid semi-annually on the days hereinbefore mentioned for "the payment of the semi-annual dividends of 3½ per cent."

99 2. The Susquehanna Company, in order to provide (*a*), for payment of the mortgage bonds heretofore issued; (*b*), for paying this defendant for surrendering said 15,950 shares

of stock, and (*c*), for such further sums as this defendant, then or hereafter, should be entitled to for expenditures upon the property, should execute to a Trust Company as trustee, a mortgage to a trustee, bearing date April 1, 1876, and securing the payment of 10,000 bonds of $1,000 each; the payment of the principal and interest of all of these bonds to be guaranteed and paid by this defendant directly to the bondholders. Of these bonds, 3,000 were, upon the execution of this contract, to be delivered by the Susquehanna Company to the trustee, and should bear interest at the rate of 7 per cent. per annum. The residue of the said bonds issued from time to time were to be delivered by the Susquehanna Company to the trustee as requested by this defendant so far and to such extent as the same might be required for the purposes before mentioned; these bonds should bear interest at the option of this defendant either at the rate of 7 per cent. per annum in currency, or at the rate of 6 per cent. per annum in gold.

3. The trustee should, upon the cancellation and surrender by this defendant of the certificates issued for 15,950 shares of stock of the Susquehanna Company, certify and issue to this defendant, 1,595 of the said 3,000 7 per cent. bonds which were then to be made, and should then certify and issue to this defendant as many more of the said 3,000 bonds as should be required to reimburse this defendant for balances due for the expenditures by it made upon the property. The trustee should also from time to time certify and issue further bonds in exchange at par for the then outstanding $3,450,000 7 per cent. mortgage bonds of the Susquehanna Company, and should from time to time certify and issue to this defendant further bonds for such amounts as should be due
100 to this defendant for moneys expended pursuant to the provisions of the Lease.

4. All certificates of stock should be called in and new certificates issued subject to the provisions of this agreement. This Company should endorse its guarantee upon all stock and bonds, the latter to be guaranteed both as to principal and interest. In the case of the stock the guarantee should provide that after the Albany City bonds should "be paid by the operation of the sinking fund provided for "their payment, the Delaware Company (this defendant) guaran-"tees to pay upon said stock 4½ per cent. semi-annually on the first "days of July and January."

5. The total amount of stock and bonds to be issued by the Susquehanna Company should never exceed in the aggregate $13,500,000, but nothing should be construed as a waiver by this defendant of its right to have a new mortgage made and new bonds issued in case of the maturity of the bonds provided for in this agreement.

Provisions were thus fully made in this contract as to every item of rental to be thereafter paid by this defendant to the Susquehanna Company in respect to the demised property, whether by way of interest upon bonds or dividends upon stock or otherwise, and to that extent the Supplemental Agreement necessarily changed, altered, modified and superseded every provision of the original Lease in

respect to the payment of rental, and thereafter the only payments to be made by way of rental by this defendant to the Susquehanna Company were those stipulated by the terms of the said Supplemental Contract.

The terms of this contract imposed upon this defendant the obligation to guarantee the payment of the principal of the bonds of the lessor, whereas before it was bound only to guarantee the interest thereon, and at the same time it reduced the amount of securities of the Susquehanna Company which this defendant could
101 receive for the cost of betterments made to the demised property, in the amount of $1,500,000.

This Supplemental Contract authorized the issue of new Consolidated Bonds in exchange at par for any and all of the outstanding Mortgage Bonds of the Susquehanna Company amounting to $3,450,000. Accordingly, from time to time, beginning with the month of December, 1876, and extending into the month of October, 1880, $660,000 of said outstanding Bonds of the Susquehanna Company were exchanged at par for new Consolidated Bonds bearing seven per cent. interest, and thereafter the balance of the said outstanding Bonds of the Susquehanna Company were from time to time exchanged at par for new Consolidated Bonds bearing only six per cent. interest, this defendant having elected, under its option in that behalf, that $7,000,000 of the new Bonds should bear only six per cent. interest. This defendant further says, upon information and *behalf*, that the control of the Susquehanna Company by a majority of its original directors continued for many years thereafter and until all of the said former seven per cent. bonds had been exchanged for such new bonds, and in the meantime no officer or director or stockholder of the Susquehanna Company made any claim that this defendant was bound to pay to the Susquehanna Company the one per cent. saving arising from the exchange of certain of the seven per cent. Bonds for six per cent. Bonds.

The Supplemental Contract had given to this defendant the option of having the new $3,450,000 of Consolidated Bonds, which were to be issued in exchange for the outstanding seven per cent. bonds of the Susquehanna Company, bear either seven per cent. or six per cent. interest, necessarily implying that this defendant would itself be directly interested in the result of fixing a higher or lower rate of interest upon such bonds, as this defendant insists was the fact under the terms of the original Lease. All parties to the contract early adopted a construction of the original Lease and Supplemental Contract, which entitled this defendant to the
102 benefit of any saving in the rate of interest to be paid upon the mortgage issues of the Susquehanna Company, and on the other hand imposed upon this defendant the burden arising from any increase in such rate of interest.

This contemporaneous construction has remained without question for a period of nearly thirty years. This was the construction of the Lease and Supplemental Contract then, as now, understood by this defendant, and as this defendant then believed and still believes by the Susquehanna Company itself; and this defendant, from the be-

ginning, has acted in reliance upon that construction in conducting the operations of the demised property under the Lease. Even under this construction, and notwithstanding all savings made by the reduction of interest upon the refunding of the mortgage bonds of the Susquehanna Company, the burdens of this defendant as lessees were largely increased under the Supplemental Contract.

No claim such as is set forth in the said bill was ever made against this defendant on behalf of the Susquehanna Company, until the months of November or December, 1905, when claims to that effect were, for the first time, asserted by those who afterwards promoted this suit, as will be more fully set forth later in this answer. This defendant therefore insists that there has been gross laches on the part of these complainants in seeking to enforce the said alleged claims against this defendant, and that this suit in that behalf should not now be entertained by this Court.

This defendant further answering denies that it has at any time failed to pay any amount by way of rental which it was bound to pay to the Susquehanna Company under the said Lease or under the said Supplemental Contract. It admits that it has not paid to the Susquehanna Company since the payment or discharge of any of its $3,450,000 of bonds secured by the mortgages existing when the said Supplemental Lease was made, any amount as representing any saving of interest by reason of the fact that some of the new bonds of the Susquehanna Company issued to take the place of any of
103 the said former bonds, bore less than seven per cent. interest, but it denies that it was bound to make any such payment. It admits that the bonds of the Susquehanna Company maturing April 1, 1906, were retired by the issue of new bonds of that Company bearing only three and one-half per cent. interest, but it denies that it should pay to the Susquehanna Company for its stockholders or otherwise any amount which it is thereby relieved from paying as interest upon the former bonds of the Susquehanna Company. It further says that on June 30, 1906, this defendant was required to pay to the State of New York by way of tax upon the mortgage securing the said new three and one-half per cent. bonds, the amount of $12,465.75 being at the rate of one-half of one per cent. per annum upon the said bonds for the period between April 1 and July 1, 1906.

This defendant denies that it is true, as alleged in the bill of complaint, that this defendant insists that it has a right to credit all sums paid under said Lease, upon any rental such as is claimed by the complainants to have been constituted under the said Lease as a so-called minimum rental; and this defendant denies that any so-called minimum rental was constituted under the said Lease beyond the period when the $3,500,000 of bonds of the Susquehanna Company issued under its so-called first, second and third mortgages were in fact outstanding; and the claims made or insisted upon by this defendant in that behalf are those which have been set forth in this answer. It admits that certain provisions of the said Lease gave certain preference to the first, second and third mortgage bonds of the Susquehanna Company and to the $2,500,000 capital stock mentioned in the said Lease, and it craves leave to refer to the provisions of the said Lease

in that behalf, and denies that the meaning thereof is correctly set forth in the bill of complaint.

This defendant admits that $2,790,000 and no more of the consolidated bonds of the Susquehanna Company, bearing six per
104 cent. interest, and $660,000 of the consolidated bonds bearing seven per cent. interest, were under the terms of the Supplemental Contract issued in exchange for the outstanding $3,450,000 of the seven per cent. mortgage bonds of the Susquehanna Company, and that the remaining $6,550,000 of the said consolidated bonds, of which $2,340,000 bore seven per cent. interest and $4,210,000 six per cent. interest, were issued to this defendant for betterments made to the leased property, but it denies that there was any agreement as to the application upon the rental of the interest paid by this defendant on any particular class of the said bonds. It admits that the $10,000,000 of bonds issued by the Susquehanna Company on or about April 1, 1906, and guaranteed by this defendant, were used for the purpose of taking up bonds issued under the said consolidated mortgage to an equal amount, but it denies that the said new bonds represent or include any other bonds.

This defendant denies that all of the said $3,450,000 of bonds of the Susquehanna Company bearing seven per cent. interest which were outstanding at the time of the making of the said Supplemental Contract, were, prior to the year 1880 or at any other time, retired by the issue of new bonds bearing six per cent. interest, but says that only $2,790,000 of the same were so retired by the issue of new bonds bearing six per cent. interest, and that such retirement was not wholly effected until November, 1888; and it further denies that upon the retirement of any of the said bonds by the issue of new six per cent. bonds, this defendant was bound to pay either to the said Susquehanna Company or to its stockholders the difference between six and seven per cent. interest upon the said bonds, or that any such amount should have been added to the dividends upon the stock of the Susquehanna Company, or that if so added it would have increased such dividends in the amount of one per cent. annually; and it further denies that there is now due and owing from this defendant to the Susquehanna Company any amount in that behalf, or that if any such amount were owing by this defendant to the Susque-
105 hanna Company the same should be paid to the stockholders of the Susquehanna Company, or that any amount is due to the complainants by reason of the matters set forth in the bill of complaint; and this defendant further answering says that if any money were owing to the Susquehanna Company from this defendant by reason of the matters alleged in the bill of complaint, this defendant before paying the same would be entitled to deduct large amounts of money which it has been compelled to pay for the account of the Susquehanna Company in order to retain quiet possession of the leased property, such as the Susquehanna Company covenanted in and by the said Lease and Supplemental Contract this defendant should always have and enjoy.

And this defendant claims the benefit of the provisions made in and by the Statute of Limitations made by Section 381 of the Code

of Civil Procedure of the State of New York respecting limitations of actions, and of all other statutes of limitations, in bar to the relief sought by the plaintiffs in this suit in respect to the claim that this defendant has failed to pay to its co-defendant, the Susquehanna Company, any of the rental accruing under the terms of the said Lease and Supplemental Contract, in like manner as if this defendant had pleaded the same.

THIRD. *To so much of the bill of complaint as alleges matters in support of the right claimed by the complainants to prosecute, on behalf of The Albany and Susquehanna Railroad Company, the alleged claims of the said Susquehanna Company against this defendant, this defendant further answering says:*

The complainants do not show in the said bill of complaint any capacity in themselves to maintain this suit, in that they admit that they have not made any prior demand upon the defendant, the Susquehanna Company, its officers, directors or upon the stockholders of the said Company or any of them, to take any action in re-
106 spect to the said alleged claims and that therefore there has never been any refusal of any such demand; and in that they fail to show in the said bill of complaint any legal or sufficient reason or excuse for dispensing with such prior demand; and in that it does not appear from the said bill that all or any of the complainants were shareholders of the said Susquehanna Company at the time when it is alleged that this defendant first omitted to pay its full rent under the provisions of Exhibit A annexed to the said bill of complaint, or that the shares of such of the complainants as were not shareholders at the said time have since devolved upon them by operation of law.

This defendant further answering says that it is not true as alleged in the said bill that the said Susquehanna Company has at any time substantially ceased to exist save as a continuing source of title for this defendant as lessee and for the protection of its interests, or that all the active functions of the Susquehanna Company were assumed or performed by this defendant as lessee. This defendant admits that as lessee it was given by the Susquehanna Company the exclusive management and control of the leased property, but says that the power to enforce the said Lease and also the control of the rental necessarily remained with the lessor, except so far as under the said Lease and Supplemental Contract this defendant was required to guarantee and pay portions of such rental to the holders of the bonds and stock of the Susquehanna Company. This defendant further charges and avers that under the said Lease and Supplemental Contract, the said Susquehanna Company agreed to maintain at all times its corporate existence, and that it has done so continuously since the execution of the said Lease; and that the complainants in their said bill of complaint themselves assume and assert that the corporate existence of the said Susquehanna Company has in fact continued so far as necessary for the creation and maintaining of legal rights in its behalf against third persons, so that the said bill of complaint in that behalf proceeds upon the ground of the existence of
107 legal rights in favor of the said Susquehanna Company as an existing corporation. It is true that in and by the said Lease the Susquehanna Company covenated to perform all such acts as

might be necessary for the due protection of this defendant as lessee, at the expense however of this defendant, and authorized this defendant, as far as it could so do, to use the name of the Susquehanna Company whenever necessary or proper for the enforcement of the rights of this defendant against third parties; but these were covenants to be performed by the Susquehanna Company itself, and it was therefore necessary under the provisions of the Lease that the corporate existence of the Susquehanna Company should continue after the said Lease as fully as before the same, as indeed the rules of law necessarily required. The Susquehanna Company still possesses and enjoys all its property and franchises, and the State of New York annually imposes and collects franchise taxes upon the Susquehanna Company as an existing corporation. No assignment or surrender by the Susquehanna Company to its stockholders, as such or as individuals, of its property or other rights against this defendant or other third persons, was ever made or could have been lawfully made by the Susquehanna Company. Whatever rights exist against this defendant by reason of non-payment of any portion of the rental required by the said Lease and Supplemental Contract to be made to the Susquehanna Company, necessarily exist in favor of the Susquehanna Company itself, and not in favor of its stockholders.

This defendant further says that the said Susquehanna Company ever since the making of the said Lease has been managed by its own Board of Directors regularly elected annually by its stockholders; and that its present Board of Directors is composed wholly of individuals who directly represent the complainants.

This defendant admits that at the time when this suit was instituted a majority of the Board of Directors of the Susquehanna Company were individuals who were also either officers or
108 directors of this defendant, being the persons mentioned in the bill of complaint. This defendant avers upon information and belief that after the making of the said Lease the then members of the Board of Directors of the Susquehanna Company were re-elected until their respective deaths or their resignations as directors; that it was found difficult to find persons to take the place of such directors deceasing or resigning, who were willing to attend regularly the meetings of the board of directors which were called from time to time, other than such persons as could be induced by this defendant to act as such directors, and that the individuals who thus were induced to become such directors were largely officers or directors of this defendant. This defendant upon information and belief says, however, that such new directors of the Susquehanna Company so nominated by this defendant for that purpose, did not constitute a majority of the board of directors of the Susquehanna Company before the year 1897. This defendant further says that it is not true that such of the members of the board of directors of the Susquehanna Company as were directors or officers of this defendant in fact controlled this defendant or its board of directors; and that it is not true that they represented as such directors of the Susquehanna Company the interests of this defendant in opposition to the interests of the Susquehanna Company, or were under any duty to this defend-

ant or to its stockholders to help this defendant and to protect its interest as against the Susquehanna Company or its stockholders; and this defendant avers upon the contrary that such directors and officers of this defendant, while acting as directors of the Susquehanna Company, always fully performed their said duties to the Susquehanna Company and its stockholders, never believing that their relations to this defendant required them to act unjustly towards the Susquehanna Company. This defendant never sought to influence them in their action as such directors.

109 This defendant admits that Robert Olyphant named in the bill of complaint was President and director of the Susquehanna Company at the time this suit was instituted, but denies that he is now either such president or director, and further denies that he was an agent or representative of this defendant or that his business was dependent upon this defendant or that he was represented on the board of directors of this defendant, although this defendant admits that said Robert Olyphant is the son of Robert M. Olyphant, one of the directors of this defendant and chairman of the executive committee of its board of directors. This defendant denies that William L. M. Phelps, who was and still is secretary of the Susquehanna Company and who was a member of its board of directors when this suit was instituted, was so employed by this defendant; and this defendant says that on the contrary the said Phelps was secretary of the Susquehanna Company before this defendant became lessee under the said Lease in February, 1870, and that he has continuously been and still is retained as such secretary by the successive boards of directors of the Susquehanna Company, and not by this defendant. This defendant also denies that either James H. Manning or Robert C. Pruyn, who were directors of the Susquehanna Company at the time this suit was instituted, was largely interested with this defendant or had intimate business relations therewith while such director.

This defendant further says that none of the individuals mentioned in the bill of complaint as being the directors of the Susquehanna Company, are now directors of the said Company.

This defendant admits that it owns about forty-five hundred shares of the capital stock of the Susquehanna Company. This defendant does not know how many shares of the said stock are owned by the directors of this defendant, but it denies that this defendant or that this defendant and its directors control a majority of the shares of the capital stock of the Susquehanna Company, or that this defendant or its directors have ever procured the stock held by them

110 or either of them to be voted in opposition to the interests of the Susquehanna Company, or that any of its directors have ever known or had any reason to know that this defendant was indebted to the Susquehanna Company, or that they conspired with this defendant to deprive the Susquehanna Company and its stockholders of any income to which they were entitled, for the benefit of this defendant or otherwise; and this defendant again denies that this defendant has ever been so indebted to the Susquehanna Company.

This defendant admits that it knew and approved of the issuing of the notice, circular and form of proxy referred to in the bill of complaint, copies of which are annexed thereto as Exhibits C, D and E, and that such documents were issued in consequence of a request to this defendant that the Susquehanna Company should make an issue of $10,000,000 at par of its new four per cent. preferred stock, upon an increase of such stock to be made for that purpose, such shares to be guaranteed by this defendant and the proceeds of the sale thereof applied to the redemption of the before mentioned issue of $10,000,000 Consolidated Bonds of the Susquehanna Company which were to mature on April 1, 1906, and that when a small minority of the shareholders of the Susquehanna Company objected to the issue of such preferred stock, this defendant, being at all times willing to respect the wishes of the security holders of the Susquehanna Company so far as it could consistently do so, withdrew its said request and accepted from the Susquehanna Company $10,000,000 of its forty year three and one-half per cent. mortgage gold bonds, the payment of the principal and interest of which was then guaranteed by this defendant and used in order to redeem the said outstanding $10,000,000 Consolidated Bonds of the Susquehanna Company, of which $3,000,000 bore seven per cent. interest and $7,000,000 six per cent. interest.

111 While this defendant avers and insists that the allegations of the said bill in respect to the said exhibits are absolutely immaterial and impertinent to any issue involved in this suit, and therefore need not be answered by this defendant, it nevertheless further answering says that when it made the said request it was advised and believed and still believes that the proposed issue of the said preferred stock would not have been inconsistent with the provisions of the said Lease and Supplemental Contract, and that it would have been greatly to the advantage of the Susquehanna Company and of all its stockholders if the said Consolidated Bonds had been redeemed by the issue of such preferred stock rather than through the issue of the new Mortgage Bonds of that Company which was actually made for that purpose; since the issue of such preferred stock would have funded forever at four per cent. the said $10,000,000 mortgage debt, and since the holders of such preferred stock could never have the right by the foreclosure of any lien to cut off and destroy the rights of the holders of the original stock of the Susquehanna Company, their sole pecuniary rights being to receive two per cent. semi-annual dividends upon the said shares of stock and to enforce the guarantee of this defendant of the payment of such dividends. This defendant denies that Exhibits C, D and E were issued collusively, as alleged in the bill, or that the statements therein were in any respect incorrect or misleading or that the said scheme was supported by the directors of the Susquehanna Company acting in collusion with this defendant or for its benefit, or that the said scheme was in any respect in violation of the rights of the complainants or other stockholders of the Susquehanna Company, or that the execution of the said scheme could have been enjoined by any or all of the stockholders of the Susquehanna Company.

This defendant upon information and belief denies that a demand by the complainants or any other stockholders of the Susquehanna Company made to the officers or directors of the Susquehanna Company before the institution of this suit, requesting that Company to take any action upon its part with reference to the matters and things alleged in the bill of complaint, would have been idle or nugatory; and avers upon information and belief that if any such demand had been made of the said officers or directors of the Susquehanna Company or of the stockholders of the said Company, such action would have been taken by the said Company in that behalf as should have been advised by disinterested counsel learned in the law and in no way connected with this defendant to be proper or expedient, and this defendant says that at a meeting of the stockholders of the Susquehanna Company held within four months after this suit was instituted, the promoters of this suit were elected directors of the said Company and now constitute a majority of such directors.

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Further answering, this defendant alleges upon information and belief that this suit has been brought as a part of a scheme devised by a combination of individuals, not including the complainants, acting as a so-called Protective Committee, whereby the owners of shares of the capital stock of the Susquehanna Company should be induced to deposit their certificates for such shares with a depositary subjets to the order of such committee and make a transfer of their shares to the said committee, subject to an agreement in writing authorizing the members of the said committee to institute one or more suits or actions, either in their own names or in that of one or more of such depositing stockholders, to compel this defendant to pay to the Susquehanna Company sums of money by way of further rental under its lease from the Susquehanna Company, and to compromise such suits or actions; it being a part of the agreement in that behalf that such depositing stockholders should not be liable for the expenses of any litigation so instituted beyond the amount of one per centum upon the par value of their shares, any expenses beyond such amount being necessarily borne by the members of the said committee; and it being also part of the said scheme that the members of the said committee should be allowed for their compensation and for fees to the counsel of the committee a certain percentage of the total amount of benefit derived by the depositing stockholders from the action of the committee and that in estimating this benefit any increased dividend rate upon the depositing shares consequent upon the proposed litigation should be capitalized upon a fixed interest basis. The aforesaid agreement contained further detailed provisions as to the respective rights of the depositing stockholders and the members of the said committee, and was distributed among the stockholders of the Susquehanna Company accompanied by certain other instruments referred to therein, of all of which instruments this defendant will ask to make proof on the trial of this suit. This defendant avers, upon information and belief, that the complainants herein have in fact, as contemplated by the terms of the said scheme, made an actual transfer of

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their shares of stock of the Susquehanna Company to the said committee, and are no longer the legal owners of such shares.

This defendant further says, upon information and belief, that the said Protective Committee caused the institution of this suit and, for the purpose of conferring jurisdiction of this suit upon this Court, intentionally selected as complainants in this suit only persons and corporations who were citizens of other States than the State of New York, and for the same purpose refrained from making any demand upon the Susquehanna Company or the stockholders thereof to take any action in respect to any of the matters alleged in the bill of complaint herein; and that this suit was collusively brought to confer jurisdiction upon the Circuit Court of the United States in respect to a matter of which it would not otherwise have cognizance, since any action brought by the Susquehanna Company itself against this defendant would necessarily have been brought in the Courts of the State of New York, both parties
114 being citizens of that State within the meaning of the statutes conferring jurisdiction upon United States Circuit Courts.

FOURTH. *To so much of said bill of complaint as claims or alleges that this defendant has failed to pay to the holders of the shares of stock of the Susquehanna Company any part of any dividends which this defendant was obligated to pay to such stockholders by reason of its direct guarantee of such dividends made to the said stockholders in pursuance of the said Lease and Supplemental Contract, this defendant further answering says:*

This defendant admits that it has endorsed upon all the certificates of stock issued by the Susquehanna Company a guaranty as follows: "The Delaware and Hudson Company hereby for value received "guarantees the payment of a semi-annual dividend of three and "one-half per cent. upon the stock represented by the within certifi- "cate, to be paid on the first days of January and July in each year, "until the Albany City Bonds which were loaned to the Albany and "Susquehanna Railroad Company to the amount of one million dol- "lars shall be paid by the operation of the sinking fund provided for "their payment, and thereafter the said Company guarantees to pay "upon said stock four and one-half per cent. semi-annually on the "same days, subject to the conditions and provisions of the Lease "made by said Railroad Company to said Company dated February "twenty-fourth, 1870, and of an agreement supplemental thereto "dated the seventh day of March, A. D. 1876."

This defendant admits that the City of Albany did loan to the Susquehanna Company under the provisions of an act of the Legislature of the State of New York, as set forth in the bill of complaint in that behalf, its six per cent. thirty year Bonds in the amount of $1,000,000, and that to secure the payment of the said Bonds and six per cent. interest thereon, as the same shall accrue, and also the payment to the Trustees of the Sinking Fund of the City of Albany of
115 one per centum annually upon the said bonds, and also the payment to the said Trustees of any premiums which should be received by the Susquehanna Company upon the sale of the said

City Bonds, the Susquehanna Company executed on or about November 1, 1865, a mortgage upon its railroad property and franchises to the Mayor, Aldermen and Commonalty of the City of Albany, to which mortgage this defendant craves leave to refer upon the trial of this action for evidence as to its terms. This defendant also admits that in and by the said mortgage the Susquehanna Company covenanted to pay also to the said Sinking Fund Trustees any moneys which it should derive from the sale of any portion of any of the mortgaged premises made with the consent of the mortgagees in the said mortgage.

This defendant upon information and belief says that no premiums were received by the Susquehanna Company upon the sale of the said Bonds, and that no portion of the mortgaged property was sold by the Susquehanna Company during the term of the said mortgage either with or without the consent of the said mortgagees.

This defendant denies that the amounts due and payable either by the Susquehanna Company or by this defendant to the said Sinking Fund of the City of Albany, if made, would have been sufficient to have paid the said Albany City Bonds before the year 1902. The said $1,000,000 thirty year six per cent. Albany City Bonds loaned to the Susquehanna Company bore dates as follows: $250,000, November 1, 1865; $250,000, May 1, 1866; $250,000, November 1, 1866, and $250,000, May 1, 1867, and were respectively issued to the Susquehanna Company on or about the said dates. These bonds therefore matured respectively on November 1, 1895; May 1, 1896; November 1, 1896, and May 1, 1897. The sinking fund installments during the term of the said Bonds would amount to only $300,000, but at the then prevailing rate of interest it had been calcu-
116 lated that the accumulated interest upon the said installments from the time of their respective payments would yield a fund sufficient to redeem the said bonds. The legal rate of interest in the State of New York having been reduced to six per centum in the year 1880, and the rate of interest upon such investments as could be made by the Trustees of the sinking fund having fallen even below the rate of six per centum, the sinking fund did not suffice to pay the whole issue of the said bonds as the same matured, although in fact the Susquehanna Company and this defendant at all times duly paid the said annual installments of $10,000 to the Trustees of the said sinking fund down to the time of the maturity of the said bonds. In fact the sinking fund sufficed only to pay the $250,000 of the said City Bonds maturing November 1, 1895, the $250,000 maturing May 1, 1896, and about $180,000 of the $250,000 maturing November 1, 1896. The remainder of the said bonds were paid by this defendant for the account of the Susquehanna Company when the said bonds matured respectively November 1, 1895, and May 1, 1896. Upon making such payments this defendant took the obligations of the Susquehanna Company for the amounts so paid, and thereafter applied the payments of $70,000 a year which theretofore had been applied to the payment of the interest and sinking fund contributions upon the said City Bonds, to the reduction of the said obligations of the Susquehanna Company and the payment of interest thereon;

with the result that the said obligations were not extinguished until some time in the year 1902, prior to the first day of July, 1902. On May 1, 1897, the amounts so advanced by this defendant for the Susquehanna Company amounted to $250,000, an amount which would not have been satisfied by the application thereto of $10,000 annually in continuation of the sinking fund contributions, until May 1, 1922. This defendant therefore avers and insists that the said Albany City Bonds have not as yet been paid "by the operation of the sink-

117 ing fund provided for their payment" within the meaning of the provisions of the said Supplemental Contract and of the guaranty made by this defendant to the stockholders of the Susquehanna Company; and that this defendant was not in January, 1903, legally bound to pay to the holders of the shares of stock of the Susquehanna Company any semi-annual dividends upon their stock in excess of three and one-half per centum. This defendant further says that before the year 1897 the Susquehanna Company had become largely indebted to this defendant by reason of the payment by this defendant to the State of New York of the amounts annually imposed upon the Susquehanna Company by way of franchise taxes, which taxes this defendant was not obligated itself to pay under the terms of the said Lease and Supplemental Contract, but was compelled to pay to maintain the quiet possession of the leased property which had been covenanted in the said Lease; and that this defendant therefore had the right after the year 1897 to withhold the further annual payment to the Susqushanna Company of the said amount of $70,000 before paid by it in respect to the said Albany City Bonds, or of so much of the same as should be needed from time to time to cover the amount of the said franchise taxes theretofore paid or thereafter annually imposed, and to continue to do this until the said Albany City Bonds had in fact been paid "by the operation of the sinking fund provided for their payment." This defendant also says that there are other items of indebtedness owing to it by the Susquehanna Company in addition to those already set forth, but that this defendant has not known of any means of collecting the same from the said Company.

This defendant however on January 1, 1903, nevertheless, began the payment of four and one-half per cent. dividends semi-annually to the holders of the shares of capital stock of the Susquehanna Company, although no legal right then existed in favor of the said stockholders to receive these increased dividends from this defendant, and has ever since continued such payments.

118 This defendant denies that upon the payment of the said $1,000,000 Albany City Bonds it failed to pay the amount designated for the service thereof or otherwise during its existence as in the said Lease provided, or that it retained the same or any part thereof for its own use.

This defendant, upon information and belief, denies that about the year 1881 or at any time the accounts and records of the Trustees of the aforesaid sinking fund were destroyed by fire or otherwise, or that since the said year the said Trustees have kept no complete accounts; and this defendant avers on the contrary that the

said accounts are still in existence, and that they were fully kept by the said Trustees and reported to the City of Albany until after the period when the said City Bonds were fully paid through moneys advanced for that purpose by this defendant.

This defendant also denies that any accounts showing the investments of the moneys paid by the Susquehanna Company or by this defendant to the said Sinking Fund Trustees, are or ever have been in the possession or under the control of this defendant; although this defendant does not deny that since the institution of this suit it has procured printed copies of the said reports of the said Sinking Fund Trustees.

This defendant denies that it now holds or ever held any trust relations with the complainants or with the Susquehanna Company in respect to the said sinking fund investments or its accounts, and avers that its only duty in the premises was to make the payment of the annual installments toward the said sinking fund to the proper officials of the City of Albany, and says that the said payments were all duly and promptly made.

This defendant further says that neither the complainants nor any other stockholder of the Susquehanna Company has ever applied to this defendant for any statement or any account of the time when or the manner in which, the said Albany City Bonds had been paid or whether they had in fact been paid by the
119 operation of the sinking fund provided for their payment; and that upon any request made in that behalf this defendant would have furnished any such applicant with a full statement of the facts. This defendant further says that prior to the institution of this suit no intimation was given to this defendant by or on behalf of the plaintiffs or any other stockholder of the Susquehanna Company, or by the so-called Protective Committee before in this answer referred to, or by the attorneys of that Committee, some or all of whom are the attorneys for the plaintiffs herein, that any claim was supposed to exist in favor of the stockholders of the Susquehanna Company by reason of the matters alleged in the bill of complaint; and that the filing of the bill of complaint herein was the first intimation received by this defendant that anyone supposed any such claim existed.

This defendant avers and insists therefore that it is under no duty to account to the plaintiffs or to the Susquehanna Company in respect to the said sinking fund or its investments.

This defendant also insists and avers that if the complainants or any other stockholders of the Susquehanna Company have any right to receive from this defendant any further payment of moneys as dividends upon their respective shares of stock, under the guaranty or guaranties of this defendant endorsed upon the certificates for such shares respectively, then a perfect and adequate remedy at law exists in that behalf, to which they have not resorted and which has not been exhausted; and that they therefore have no standing in a Court of Equity to maintain this suit in that behalf against this defendant.

And this defendant denies all and all manner of unlawful com-

bination and confederacy wherewith it is by the said bill charged, without this, that *there is* any other matter, cause or thing in the said plaintiffs' said bill of complaint contained material or necessary for this defendant to make answer unto, and not herein or
120 hereby well and sufficiently answered, confessed, traversed and avoided or denied, is true to the knowledge or belief of this defendant; all which matters and things this defendant is ready and willing to aver, maintain and prove, as this Honorable Court shall direct, and humbly prays to be hence dismissed with its reasonable costs and charges in this behalf most wrongfully sustained.

THE DELAWARE & HUDSON COMPANY,
By OPDYKE, LADD & BRISTOW,
[SEAL.] *Its Solicitors.*

LEWIS E. CARR,
WM. S. OPDYKE,
Of Counsel.

UNITED STATES OF AMERICA,
Southern District of New York,
City, County, and State of New York, ss:

Charles A. Walker, being duly sworn, doth depose and say: I am the Treasurer of The Delaware and Hudson Company, the above named defendant, and as such am authorized to make this affidavit for and on behalf of said corporation. So much of the foregoing answer as concerns the acts and deeds of the said defendant is true to the best of my knowledge, and so much thereof as concerns the acts and deeds of any other person or persons, I believe to be true.

CHARLES A. WALKER.

Sworn to before me this 28th day of November, 1906.

THOS. J. CURRAN,
[SEAL.] *Notary Public* (132), *New York County.*

(Endorsed:) U. S. Circuit Court. Filed Nov. 28, 1906. Southern District, New York. John A. Shields, Clerk.

121 *Replication.*

United States Circuit Court, Southern District of New York.

AETNA INSURANCE COMPANY ET AL., Complainants,
against
ALBANY & SUSQUEHANNA RAILROAD COMPANY and DELAWARE & HUDSON COMPANY, Defendants.

The Replication of the Complainants Above Named to the Answers of Albany & Susquehanna Railroad Company and Delaware & Hudson Company, Defendants.

Now come the complainants in this suit, by Howland, Murray & Prentice, their solicitors, and saving and reserving to themselves all,

and all manner of advantage of exception to the manifold insufficiencies of the said answers, for replication thereunto saith, that they will aver and prove their said bill to be true, certain and sufficient in the law to be answered unto; and that the said answers of the said defendants are uncertain, untrue and insufficient to be replied unto by these complainants; without this, that, any other matter or thing whatsoever in the said answers contained, material or effectual in the law to be replied unto, confessed and avoided, traversed or denied, is true; all which matters and things these complainants are, and will be, ready to aver and prove, as this honorable Court shall direct; and humbly pray, as in and by their said bill they have already prayed.

HOWLAND, MURRAY & PRENTICE,
Their Solicitors.

(Endorsed:) U. S. Circuit Court. Filed Dec. 7, 1906. Southern District, New York. John A. Shields, Clerk.

122 EXHIBIT "B."

Demurrer.

United States Circuit Court, Southern District of New York. In Equity.

ÆTNA INSURANCE COMPANY ET AL., Complainants,
against
ALBANY AND SUSQUEHANNA RAILROAD COMPANY and DELAWARE AND HUDSON COMPANY, Defendants.

Demurrer of the above-named Defendant, Albany and Susquehanna Railroad Company, to the Bill of Complaint of the above-named Complainants.

This defendant demurs to the said bill of complaint and for causes of demurrer shows:

1. That it appears by the complainants' own showing by the said bill that they are not and that none of them is entitled to the relief prayed for by the bill against this defendant.

2. That said bill of complaint fails to set forth that any effort has ever been made by the complainants or any of them to secure any action concerning the matters and things set up in said bill on the part of the directors or stockholders of this defendant, and that said bill of complaint fails to set forth any reason or excuse for
123 the entire failure of the complainants and each of them to make any effort to secure action in the premises on the part of the directors or stockholders of the defendant.

3. So far as said bill of complaint seeks an accounting with respect to the time when the Albany City bonds referred to in said bill were paid by the operation of the sinking fund in that behalf provided, the said bill wholly fails to show that the complainants or

any of them ever sought any information on this subject from this defendant or any of its officers or agents or directors, or ever sought permission of this defendant, its officers, agents or directors, to examine the books of this defendant relating to such accounts.

Wherefore, and for divers other good causes of demurrer appearing on the said bill of complaint, this defendant demurs thereto and prays the judgment of this Honorable Court whether it shall be compelled to make any answer to said bill, and prays to be hence dismissed with its reasonable costs in this behalf sustained.

ALBANY AND SUSQUEHANNA
RAILROAD COMPANY,
By ROBERT OLYPHANT, *President.*

I hereby certify that the foregoing demurrer is, in my opinion, well founded in point of law.

WALKER D. HINES,
Counsel for Defendant Albany and
Susquehanna Railroad Company.

124 UNITED STATES OF AMERICA,
Southern District of New York, ss:

Robert Olyphant, being duly sworn, deposes and says: That he is the president of the above-named defendant, Albany and Susquehanna Railroad Company, and that the foregoing demurrer is not interposed for delay.

ROBERT OLYPHANT.

Sworn to before me this 28th day of September, 1906.

[SEAL.] FLORENCE M. EPWORTH,
Notary Public, Kings Co.

Cert. filed in N. Y. Co.

(Endorsed:) In Equity.—United States Circuit Court, Southern District of New York.—Ætna Insurance Company *et al.*, Complainants, against Albany and Susquehanna Railroad Company and Delaware & Hudson Company, defendants.—Demurrer.—Walker D. Hines, Atty. for Defendant, Albany and Susquehanna Co., 52 William St., Borough of Manhattan, New York, N. Y.—U. S. Circuit Court.—Filed Sept. 29, 1906.—John A. Shields, Clerk.

125 United States Circuit Court, Southern District of New York.

ÆTNA INSURANCE COMPANY ET AL., Complainants,
against
ALBANY AND SUSQUEHANNA RAILROAD COMPANY and DELAWARE AND HUDSON COMPANY, Defendants.

SIRS: Please take notice that the demurrer heretofore interposed on behalf of the defendant Albany and Susquehanna Railroad Com-

pany and filed in the office of the Clerk of this Court on the 29th day of September, 1906, is hereby withdrawn.

Dated New York, November 2, 1906.

HERBERT S. BARNES,
Solicitor for Defendant Albany & Susquehana Railroad Company, 35 Wall Street, New York.

To Messrs. Howland, Murray & Prentice, Solicitors for Complainants, 35 Wall Street, New York City.

(Endorsed:) United States Circuit Court, Southern District of New York.—Etna Insurance Company *et al.*, Complainants, against Albany & Susquehanna Railroad Company and Delaware & Hudson Company, Defendants. Copy. Notice of withdrawal of demurrer. Herbert S. Barnes, Solicitor for defendant, Albany & Susquehanna R. R. Co., 35 Wall Street, Borough of Manhattan, New York City. To Howland, Murray & Prentice, Solicitors for complainants. Due and timely service of a copy of the within notice is hereby admitted. Dated November 2, 1906. Howland, Murray & Prentice, Solicitors for complainants. U. S. Circuit Court Southern District of New York. Filed Nov. 3, 1906. John A. Shields, Clerk.

126 [Endorsed:] United States Circuit Court of Appeals, Second Circuit. Aetna Insurance Company and others, Compl'ts-Appellees, *vs.* Albany & Susquehanna R. R., Def't-Appellee, and The D. & H. Co., Defendant-Appellant. Certification of questions. United States Circuit Court of Appeals, Second Circuit. Filed May 22, 1908. William Parkin, Clerk.

Endorsed on cover: File No. 21,199. U. S. circuit court appeals, 2d circuit. Term No. 416. The Delaware & Hudson Company *vs.* The Albany & Susquehanna Railroad Company *et al.* (Certificate.) Filed May 29th, 1908. File No. 21,199.

Office Supreme Court, U. S.
FILED.
NOV 13 1909
JAMES H. McKENNEY,
CLERK.

Supreme Court of the United States.

OCTOBER TERM, 1909.

NO. 416.

THE DELAWARE AND HUDSON COMPANY,
Defendant-Appellant,
against
ALBANY AND SUSQUEHANNA RAIL ROAD COMPANY,
Defendant-Appellee;
ÆTNA INSURANCE COMPANY ET AL.,
Complainants-Appellees.

MOTIONS TO ADVANCE.

GEORGE WELWOOD MURRAY,
E. PARMALEE PRENTICE,
CHARLES P. HOWLAND,
Of Counsel for Aetna Insurance Company and other Complainants-Appellees.

C. G. Burgoyne, 72 to 78 Spring Street, New York.

Supreme Court of the United States,

OCTOBER TERM, 1908.

No. 416.

THE DELAWARE AND HUDSON COMPANY,
DEFENDANT-APPELLANT,

AGAINST

ALBANY AND SUSQUEHANNA RAIL ROAD COMPANY,
DEFENDANT-APPELLEE.

ÆTNA INSURANCE COMPANY ET AL.,
COMPLAINANTS-APPELLEES.

I.

And now come the above-named Ætna Insurance Company and others, complainants in the Circuit Court, appellees in the Circuit Court of Appeals for the Second Circuit, and move the Court that this cause be advanced on the docket and set down for hearing upon a day certain.

STATEMENT OF FACTS.

Complainants are stockholders in the Albany and Susquehanna Rail Road Company, some being citizens of the State of Rhode Island and all others citizens of the State of Connecticut.

The defendants are the Albany and Susquehanna Rail Road Company and The Delaware and Hudson Company, both being corporations of the State of New York.

In 1871 the Susquehanna Company leased all its property in perpetuity to the Delaware Company (Rec., pp. 8, 61), the principal part of the rent to be paid as guaranteed dividends directly to stockholders in the lessor corporation, the balance to go to the Susquehanna Company or for its account; the lessee's covenants to make all these payments being contained both in the lease and also by direct undertaking with each stockholder endorsed upon his certificate (Rec., pp. 8–9, 76). All the stock in the Susquehanna Company was so endorsed and guaranteed by the Delaware Company, including the stock held by complainants. The Delaware Company having failed to pay the rent due under the lease and guarantees, the present suit was instituted on June 12, 1906, in behalf of the complainants and all others similarly situated for an accounting of all rental payments due under the lease and the respective guarantees.

The defendant corporations Albany and Susquehanna Rail Road Company and Delaware and Hudson Company, demurred to complainants' bill (Rec., pp. 45, 81). The demurrers were general, raising the entire merits of the case, but were also specific asserting that complainants had failed to comply with Equity Rule 94 and were therefore unable to maintain the action. The Delaware and Hudson Company repeated these defenses subsequently by answer and also set up other defenses, including laches and the statute of limitations.

In the Circuit Court jurisdiction was sustained, evidence was introduced and on January 24, 1908, decree against the Delaware Company was entered for the sum of $1,107,923.24, arrears of rent, with interest, accruing since June 12, 1886. From this decree the defendant The Delaware and Hudson Company appealed to the United States Circuit Court of Appeals for the Second Circuit where this case was argued in April, 1908. On May 22, 1908, the Circuit Court of Appeals certified to this Court the questions here presented for decision.

> FIRST: "Does the fact that before institution of this suit complainants made no demand for relief upon the Board of Directors of the Susquehanna Company prevent them from maintaining this bill?"

SECOND: "Does the fact that before institution of this suit complainants made no effort to obtain relief at a stockholders' meeting prevent them from maintaining this bill?"

Awaiting the instructions of this Court, the said Circuit Court of Appeals now retains the cause under advisement until the answer to these questions shall be received.

These interrogatories involve:

A. The construction of Rule 94, in cases where the corporation whose rights it is sought to assert, is in the hostile control of the corporation against which the demand is made; and

B. The question whether Rule 94 applies to holders of guaranteed stock.

A. DELAWARE CONTROL OF THE SUSQUEHANNA COMPANY.

When this suit was instituted, and long prior thereto, the Board of Directors of the Albany and Susquehanna Rail Road Company was composed entirely of directors, officers and representatives of the Delaware and Hudson Company. This management of the Susquehanna Company the Circuit Court of Appeals in its certificate in this case termed "*the administration of the Delaware Company*" (Certificate of Circuit Court of Appeals, Rec., p. 3). The present suit was instituted to review the conduct of this Board of Directors. In their relation to the Delaware Company the persons who composed the Board of Directors of the Albany and Susquehanna Company when this bill was filed, were charged with the protection of the interests of the Delaware Company and the defense of all litigation instituted against that company. In their relation to the Susquehanna Company the conduct of the persons who composed the Board of Directors of that Company at the time this bill was filed, furnishes the subject matter of the litigation. The Circuit Court of Appeals states in its certificate that "none of the directors or officers of the Delaware Company ever, before or after the bringing of this suit, treated the claim therein set forth otherwise than as one of doubtful validity the payment of which was to be resisted" (Rec., p. 2). For at least six months before this suit was begun the Susquehanna directors had known the claim which their corporation held against the Delaware Company, for "from and after December 1905" a Committee of Susquehanna stockholders "had been opposing the administration of the Delaware Company upon the questions involved in this bill" (Certificate of Circuit Court of Appeals, Rec., p. 3). For many years the Delaware ad-

ministration had failed to assert Susquehanna rights against the Delaware Company ; for six months during which this neglect was the subject of agitation among stockholders the directors insisted upon their previous course ; after the bill was filed the Susquehanna corporation under their control joined with the Delaware Company in resisting the suit (Certificate ; Rec., p. 3). Complainants were unwilling that this litigation against the Delaware Company should be controlled by representatives of the corporation against whom the claim was asserted and who moreover were personally interested in seeing it defeated, and for this reason complainants did not before filing the present bill make any demand upon the Susquehanna directors for relief. The bill of complaint, which is verified by oath, after making very specific charges that the directors were and had been acting in collusion with the Delaware Company to protect it against the liability asserted in this case alleged that no demand for relief had been made by complainants upon directors " for the reason that such demand, under the facts and circumstances set forth, would be idle and nugatory, and that this suit is not a collusive one to confer jurisdiction upon the Circuit Court of the United States in respect to a matter of which it would not otherwise have cognizance " (Rec., pp. 21–22).

The charter of the Albany and Susquehanna Rail Road Company gives the entire management of corporate affairs to the Board of Directors (Rec., p. 2). Under this charter stockholders cannot by any action, vote or resolution authorize or compel the institution of any suit or proceeding in law or equity, nor were a suit instituted, could they control, manage or affect the same. The function of stockholders in this corporation is fully performed by the annual election of directors. No demand for relief was made by complainants upon stockholders before filing this bill for the reason that the stockholders could afford no relief. The most stockholders could do would be to refer demandants to a Board of Directors, in whom entire authority and discretion is vested.

Furthermore, the Susquehanna Company has been, since the lease was made, a subsidiary corporation of the Delaware and Hudson Company, entirely controlled by the main corporation, which maintained direct relations with Susquehanna stockholders and paid to them the income derived from their stockholdings. When complainants filed their bill the Delaware and Hudson Company controlled the stock vote of the Albany and Susquehanna Rail Road Company.

B. DOES RULE 94 PREVENT ACTIONS BY HOLDERS OF GUARANTEED STOCK?

The Certificate of the Circuit Court of Appeals refers to the pleadings for a "more detailed statement of the cause of action" (Rec., p. 1, folio 2). From the bill it appears that complainants assert a two-fold ground of jurisdiction, setting up not only their rights—under the circumstances of the case—to sue in behalf of the corporation, but also expressly founding their bill upon their direct relations with both defendant corporations under the guarantee (Bill of Complaint; Rec., pp. 4, 5, 6, 9, 17), claiming to sue in their own right upon the corporate contract to which they were parties. In this aspect of the case, the question whether complainants can maintain this action is, in another form, the question whether guaranteed stocks differ in any respect from stocks which have no guarantee, for if the guarantee will support no action it is no security. It can be shown, when the case is presented for argument, that unless the action now at bar can be maintained the Delaware Company's guaranty will support no action whatever.

> "The subject-matter here is mainly the lease itself and the collection of the rents therein provided for. In these the plaintiffs have a joint interest." * * * "It would seem that it is only through an equitable action that the proper relief can be obtained, and but for this plaintiffs would be without means of redress."
>
> *Barr vs. Railroad Company, 96 N. Y., 444, 450, 452.*

Guaranteed stockholders cannot maintain separate actions at law for many reasons. Among other things separate actions would involve preferences and unequal division of corporate income among stockholders. The rent arising from the lease may be subject to off-set, as in the present case where the off-sets claimed by the tenant exceed the sum for which judgment has been rendered. The tenant is entitled to assert whatever off-set it may have as against the entire rent arising under the lease. The whole matter therefore must be litigated in one proceeding. It is of first importance to the complainants, therefore, that they maintain the security of their guaranty and that the bill be sustained upon the strength of their direct relations with both defendant corporations.

Upon the facts thus recited complainants show to the Court in support of the foregoing motion the following:

SPECIAL AND PECULIAR REASONS FOR ADVANCEMENT OF THIS CASE.

FIRST. Very large investments of fiduciary and trust funds have been and are continually made in guaranteed stocks relying upon the security of the guaranty. Unless the guaranty is a valid, legal and binding obligation, capable of supporting a direct action by the holder thereof, all such investments, so far as concerns the security of the guaranty, are questionable and of uncertain value.

Until brought into doubt by the certificate in this case guaranteed stocks have commanded public confidence because considered to afford greater security than that afforded by stocks bearing no guaranty and for this reason many states have authorized savings banks and trustees to invest in these stocks. This case, and the questions involved, are widely known in the security markets of this country, and it is of great commercial importance to all persons, corporations and trustees interested in guaranteed stock that the doubt thus raised as to the value of guaranteed stocks be determined at an early day.

SECOND. The questions as to the proper construction and meaning of Equity Rule 94 presented in this case are frequently involved in litigation in lower courts of the United States, and it is important that these questions be determined at as early a day as possible.

THIRD. The questions arising in this case, including the questions above certified and the merits of the case, have been fully argued and are now under advisement in the Circuit Court of Appeals, where the determination of the case awaits the disposition of the preliminary jurisdictional questions certified to this Court.

Rule 26 provides that cases once adjudicated by this Court upon the merits and again brought up may be advanced by leave of the Court on motion of either party, but this case being now before the Court upon preliminary questions jurisdictional in nature, and not upon the merits, would not be entitled under the foregoing rule to advancement were it brought here after final determination by the Circuit Court of Appeals.

Unless the case be now advanced the separation of questions by the certificate of the Circuit Court of Appeals makes double delays

for this litigation—the delay of now awaiting its place on the call of the docket of this Court being about a year and a half, to which would be added delays of re-argument in the Circuit Court of Appeals and a further delay in awaiting again the call of this Court should the case come here on the merits.

The prompt and orderly progress of this litigation in the Circuit Court of Appeals and in this Court require that preliminary questions should receive the attention of this Court at as early a date as possible consistent with its practice and convenience and its views of the public interest.

FOURTH. The stock of the Albany and Susquehanna Rail Road Company is very widely distributed and held in small amounts by many women, minor children and trustees. These small holders are greatly prejudiced by delay in the progress of this litigation. Four-fifths of the number of stockholders in the Susquehanna corporation hold fifty shares in said corporation or less (Rec., p. 3).

II.

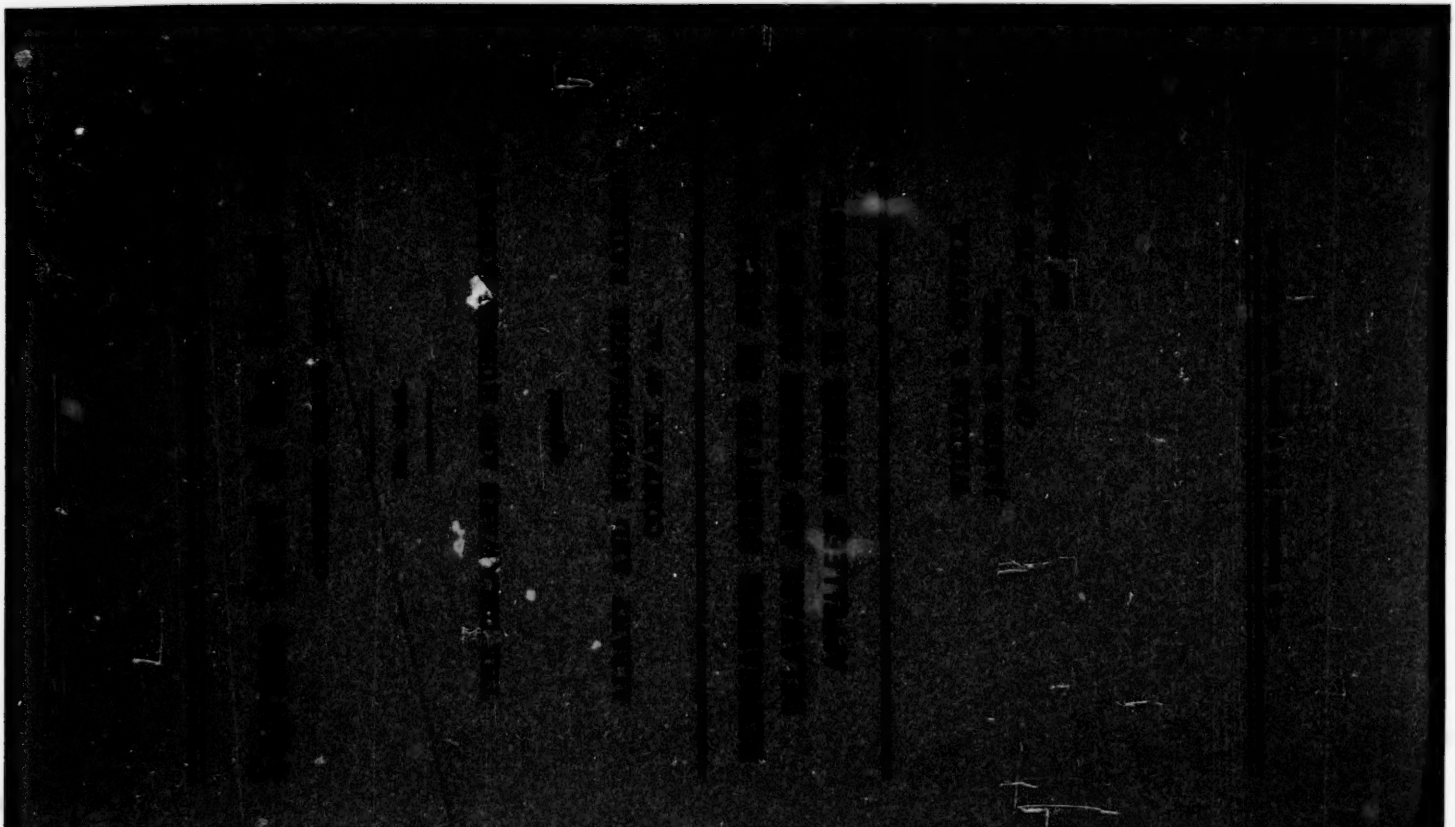
Should the foregoing motion be denied, the appellees move that this, the above-entitled cause, be advanced as under Rule 32, and taken upon briefs or heard as the Court may direct, in accordance with the provisions of Rule 6 concerning motions to dismiss writs of error and appeals.

As grounds of such motion, the said Complainants-Appellees show to the Court:

Causes brought to this Court by writs of error and appeal from the Circuit Court for decision, and in which jurisdictional questions alone are presented for determination, are, under said Rule 32, advanced for hearing. The purpose of said rule appears to be to facilitate the speedy administration of justice in the lower courts, and to this end to secure the prompt disposition of preliminary questions. In the present case the questions certified are prelim-

inary and jurisdictional questions (Chicago vs. Mills, 204 U. S., 321); and the case in which they arise is now under advisement awaiting the action of this Court. Had the case come before this Court upon appeal or writ of error, it would have fallen within said Rule 32, and being presented by certificate from the Circuit Court of Appeals, the case falls equally within the purpose of the rule.

GEORGE WELWOOD MURRAY,
E. PARMALEE PRENTICE,
CHARLES P. HOWLAND,
Of Counsel for Ætna Insurance Company and other Complainants-Appellees.



Supreme Court of the United States,

OCTOBER TERM, 1908.

No. 416.

THE DELAWARE AND HUDSON COMPANY

AGAINST

ALBANY AND SUSQUEHANNA RAILROAD COMPANY, ET AL.

MEMORANDUM

in behalf of the Delaware and Hudson Company, submitted upon appellees' motions to advance.

The Delaware and Hudson Company, the appellant below, will be satisfied to argue this cause whenever it is the pleasure of the Court to assign the same for argument. We, its counsel, feel constrained, however, to submit to the Court certain reasons why the present case has no just claim for advancement over other cases upon the calendar, and to this course we are somewhat forced by the action of counsel for the appellees below, in attempting in a motion to advance the cause to anticipate an argument upon the merits by statements of fact and conclusions of law which are not only not

pertinent to a motion to advance, but in some instances are not justified by the record.

This motion to advance this cause, to the prejudice of other cases upon the calendar, seems peculiarly destitute of merit. This Court has said in *Carter vs. Greenhow, 109 U. S., 64*, that even though "the questions involved may be of public importance," yet such fact "does not necessarily entitle the parties to a hearing in preference to others." Under the rules of this Court, and its uniform practice, the advancement of a case depends not merely upon questions "of general public interest," but it must further clearly appear that in some especial way the postponement of a decision will involve some peculiar and exceptional hardship upon a litigant. Even where the United States moves to advance, the facts must clearly disclose that "the Government will be embarrassed in the administration of its affairs by delay" *(United States vs. Norton, 91 U. S., 558)*.

The ultimate question in this case is not of general importance. It affects only the construction of a peculiar contract, and its decision cannot affect any one except the parties to this contract. As a precedent, the case on its merits is without any public interest or importance.

The questions raised by the certification do not involve the *jurisdiction* of the lower Court in the true sense of the word *(Venner vs. Northwestern Co., 209 U. S., 24)*, but involve only the right of the complainants under the general principles of equity jurisprudence and especially under Rule 94, to commence a suit in behalf of a corporation, of which they were stockholders. Whether these complainants have established such right is a matter of interest to them and to the corporation, but as the alleged right rests upon facts that are peculiar to this case, it cannot be regarded as of any general importance.

The complainants therefore not only have no higher claim to a preferential hearing than any other litigant in this Court, but as their present claim is to enforce

an alleged right, *which they aver first accrued in 1880* (Record, p. 18), their gross and unexcused laches of twenty-six years gives them even less claim for a preference over other and more diligent litigants.

Of the several reasons urged by the appellees in support of their motions to advance this cause, we submit that no one is tenable.

It is true that this case comes to this Court upon a Certificate of the Circuit Court of Appeals (Second Circuit), under the provisions of Section 6 of the Act of March 31, 1891, and that, therefore, the final disposition of the case in the Court of Appeals is held in abeyance until the instructions of this Court are delivered. But we know of no rule or practice of this Court, which advances all causes so certified, for that reason alone.

It is possibly also correct to say that the Court of Appeals desires the instructions of this Court upon the questions certified, not only for the proper disposition of this case, but for application in other cases which may be commenced in the future. But that would be so in all certified cases.

It is also true that a number of the parties to this cause are *corporations*, and that, therefore, their individual stockholders constitute a somewhat numerous body of individuals who are interested in the final outcome of this case. But this, we submit, is no sufficient reason for granting this cause a preference upon the calendar of this Court. In this connection, it is proper to point out that the "many women, minor "children and trustees" who are stockholders of the Susquehanna Company, are, by the admissions of the Bill of Complaint, presently receiving nine per cent. annual dividends from the Delaware Company (Rec., pp. 12, 13, 17, 18).

The only other reasons urged by the appellees in support of their motions, are, *first*, that a broad question of *the security of guaranteed dividends* is involved

in this case; and, *second*, that a question of the *jurisdiction* of the Circuit Court is also involved. We shall endeavor to show that neither of these questions is in the slightest way presented upon this record.

The complainants in this suit are thirteen stockholders of the Susquehanna Company. Their bill was attacked by the Delaware Company as multifarious, both by demurrer (Record, pp. 45, 46) and by answer (Record, p. 60), because it united a principal claim *in behalf of complainants' corporation* against the Delaware Company, with a minor claim in behalf of the *stockholders individually* against the Delaware Company—this latter claim being founded upon an alleged breach of the terms of the guaranties endorsed upon the complainants' individual certificates of stock of the Susquehanna Company. This double character of the bill can be readily seen by reading the double prayer for relief at the end of the bill (Record, p. 22). *The Circuit Court, however, granted no pecuniary relief whatsoever to the complainants individually*, its decree, as described in the Certificate, being simply and solely that the *Delaware Company pay to the Susquehanna Company the amount of $1,107,923.24* (Record, p. 1). The consequence of this action by the Circuit Court was not only to avoid the objection of multifariousness, *but also to eliminate all question of the right of guaranteed stockholders to sue in equity, some in behalf of all others.* The complainants have not appealed from the decree of the Circuit Court, which gave them nothing, and we do not see how they can be now heard to defend a decree in favor of their corporation, in a suit instituted by them as stockholders, on the ground that they also had individual claims upon their guaranties. Surely the bill must be read in the light of the decree, and if so read, it will be found that the only parts of the bill which related to guaranteed dividends were eliminated by the Circuit Court. Moreover, a conclusive answer to the appellees' claim that an important question of the "security of guaranteed dividends" is presented in this case, is the fact that

neither one of the two questions certified to this Court refers to any such subject.

The appellees urge finally that a *jurisdictional question* is involved in this case, which entitles them to an immediate hearing. It is true that the Circuit Court of Appeals, in its Certificate, speaks of the question of "whether the bill could be maintained under the 94th Equity Rule" as "jurisdictional in character," citing *Chicago vs. Mills, 204 U. S., 321*, and *Doctor vs. Harrington, 196 U. S., 579* (Record, p. 1). It has been, however, very recently settled by this Court, in *Venner vs. Northwestern Company, 209 U. S., 24*, that noncompliance with Rule 94, does not affect the jurisdiction of the Circuit Court, but relates only to the question whether a sufficient equitable cause of action has been shown.

It needs no argument to show that Rule 32, which the complainants also invoke, is without application to a case of this character. That Rule, by its very terms, refers to cases brought to this Court under Section 5 of the Act of March 3, 1891; whereas this case comes to this Court, not upon any question of fundamental jurisdiction, but on a request for instructions under Section 6 of the said Act (*Carter vs. Greenhow, 109 U. S., 64*).

A number of statements contained in the appellees' motion papers are wholly without support in the record, as for instance, that the Susquehanna Company demurred to the bill "upon the merits"; that at the time of the commencement of this suit, the Delaware Company "controlled the stock-vote" of the Susquehanna Company; and that at the same time, the board of the Susquehanna Company was composed "entirely of directors, officers and representatives" of the Delaware Company. But these are matters to be postponed until the argument of this case, at which time

we believe it will abundantly appear that the real question before this Court, is merely whether the complainants did not bring this particular "stockholders' suit" in the Circuit Court, without stopping to read Equity Rule 94—a question, we submit, which is not of overwhelming importance in the administration of justice in the United States.

Respectfully submitted,

WILLIAM S. OPDYKE,
JAMES M. BECK,
Of Counsel for The Delaware and Hudson Company.

Office Supreme Court, U. S.
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JAMES H. McKENNEY,
CLERK

No. 416.

Supreme Court of the United States.

OCTOBER TERM, 1908.

THE DELAWARE AND HUDSON COMPANY,
Appellant,

against

THE ALBANY AND SUSQUEHANNA RAILROAD COMPANY ET AL.,
Appellees.

BRIEF ON BEHALF OF THE DELAWARE AND HUDSON COMPANY, APPELLANT.

JAMES M. BECK,
ALFRED OPDYKE,
Counsel for Appellant.

C. G. Roebuck, 72 to 78 Spring Street, New York.

In the Supreme Court of the United States.

THE DELAWARE AND HUDSON COMPANY,
Appellant,

AGAINST

THE ALBANY AND SUSQUEHANNA RAILROAD COMPANY, THE AETNA INSURANCE COMPANY and others,
Appellees.

October Term, 1908.
No. 416.

ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF ON BEHALF OF THE DELAWARE AND HUDSON COMPANY, APPELLANT.

Statement.

This suit was brought in the United States Circuit Court, Southern District of New York, against the Albany and Susquehanna Company (hereinafter called the Susquehanna Company) and The Delaware and Hudson Company (hereinafter called the Delaware Company), both citizens of the State of New York, by the Aetna Insurance Company and twelve other stockholders of the Susquehanna Company, all of such com-

plainants being citizens of other States than the State of New York (Record, p. 1).

There was no ground for federal jurisdiction other than this diversity of citizenship.

"The bill was brought to obtain an accounting for various sums of money, which it was alleged became due at intervals during a series of years from the Delaware Company *to the Susquehanna Company* as rental or in the nature of rental under a lease made in 1870" (Rec., p. 1). It appears, therefore, that the suit was brought by the complainants as stockholders of the Susquehanna Company in a derivative capacity on behalf of the Susquehanna Company.

The trial of the cause resulted in a decree of the Circuit Court that the Delaware Company should pay to the Susquehanna Company the amount of $1,107,923.24 (Rec., p. 1).

Upon appeal taken by the Delaware Company from this decree to the United States Circuit Court of Appeals, the cause was fully argued and submitted upon briefs (Rec., p. 1).

It having appeared that there was involved the question whether the complainants' bill could be maintained under the 94th Equity Rule, the Circuit Court of Appeals has certified that question as a preliminary one to this Court, for instructions as to whether upon the facts stated in the Certificate the complainants can maintain their bill (Rec., pp. 1–3).

The specific questions certified are as follows:

> FIRST. "*Does the fact that before institution of this suit complainants made no demand for relief upon the Board of Directors of the Susquehanna Company prevent them from maintaining this bill?*"
>
> SECOND. "*Does the fact that before institution of this suit complainants made no effort to obtain relief at a stockholders' meeting prevent them from maintaining this bill?*"

The entire Certificate of the Circuit Court of Appeals is annexed as an appendix to this brief for convenient reference.

It includes the "Statement of Facts" certified by the Court of Appeals, upon which the said questions of law arose, and this statement necessarily embraces all the *facts* which can be referred to in the argument herein.

The Court of Appeals appended to this Certificate as "Exhibit A" copies of all the pleadings in the cause in the Circuit Court (Rec., pp. 4-81), stating that the same "*may be referred to for a more detailed statement of the cause of action.*"

The Cause of Action.

The suit is for the recovery of rentals alleged to be due by the Delaware Company to the Susquehanna Company under a lease made in 1870.

The lessor, the Susquehanna Company, was organized under Chapter 140 of the N. Y. Laws of 1850, passed April 2, 1850 (Rec., pp. 1, 6). Section 5 of this statute provided *inter alia :*

> "SEC. 5. There shall be a board of thirteen directors of every corporation formed under this Act to manage its affairs. Said directors shall be chosen annually by a majority of the stockholders voting at such election * * *. At every election of directors the books and papers of such company shall be exhibited to the meeting, provided a majority of the stockholders shall require it."

Not only was there this statutory requirement of annual elections of directors by the stockholders of the Susquehanna Company, but the latter expressly covenanted in the lease to maintain its corporate organization (Rec., p. 30), and annual meetings of the shareholders for the election of directors were in fact held continuously since 1870 (Rec., pp. 19, 20).

The lease in question was made by the Susquehanna Company to the Delaware Company on February 24, 1870 (Rec.,

pp. 26-34), but was modified by a "Supplemental Contract" made March 7, 1876 (Rec., pp. 35–39).

The Delaware Company, under the provisions of this lease, so modified, agreed to pay as rental an amount equivalent to the interest charges upon the bonds of the Susquehanna Company and fixed dividends upon its stock, and as a matter of convenience both the interest charges and fixed dividends were paid by the Delaware Company directly to the bondholders and stockholders respectively. As to one of the mortgage loans of the Susquehanna Company, there was a special provision for a sinking fund, the annual instalment of which the Delaware Company further agreed to pay. It is undisputed that the Delaware Company did pay the fixed dividends, and the annual interest and sinking fund requirements. Originally the interest on the bonded indebtedness was at the rate of seven per cent., but this was subsequently reduced by successive refundings, first to six per cent. and later to three and a half per cent., and the main question involved and "cause of action" in this suit, was whether the savings thus effected by such refundings were or were not payable by the Delaware Company to the Susquehanna Company.

The complainants contended in this suit, on behalf of the Susquehanna Company, that the savings of interest so arising belonged, under the terms of the Lease and Supplemental Contract, to the Susquehanna Company, in addition to the fixed dividends paid to its stockholders. The Delaware Company denied that this contention was justified by the provisions of these two contracts as properly construed. The contention of the complainants was, however, sustained by the decision of the Circuit Court. The Circuit Court of Appeals has not passed upon this question of construction.

The complainants also included in their bill a special claim, made solely in their own behalf as individual stockholders and not in a derivative capacity. This claim was based upon

a direct guaranty made by the Delaware Company to the stockholders of the Susquehanna Company. As this claim was not recognized by the Circuit Court, which by its decree treated the suit as wholly and exclusively a suit by the stockholders on behalf of the Susquehanna Company, and as no question is certified to this Court with respect to the right of the complainants themselves to maintain a claim on the said guaranty, the right of the complainants by this suit to maintain this special claim is not now before this Court, and the facts with reference to it need not therefore be more fully stated.

The following quotation from the commencement of the Certificate at once describes the decree of the Circuit Court, and limits the subject matter of the instructions prayed for by the Circuit Court of Appeals:

> "This cause comes here upon appeal from a final **decree** of the Circuit Court, Southern District of New York, **which directs that the defendant Delaware and Hudson Company** (hereinafter called the Delaware Co.) **pay to the defendant the Albany and Susquehanna Railroad Company** (hereinafter called the Susquehanna Co.) **the amount of $1,107,923.24.**
>
> "The case was fully argued and submitted on briefs. **It thereupon developed that there was a question presented whether the bill could be maintained under the 94th Equity Rule.** That question is a preliminary one, it has been held to be jurisdictional in character (City of Chicago vs. Mills, 204 U. S., 321; Doctor vs. Harrington, 196 U. S., 579), **and this court desires the instruction of the Supreme Court for its proper decision."**

The aforesaid incidental claim of the complaining stockholders, as individuals, upon a direct guaranty, for a small portion of the entire sum in controversy, arising under special circumstances and sued for in a different capacity than the

asserted right in behalf of the corporation, should, therefore, be eliminated from the consideration of this case, for four controlling reasons:

1. The principal claim of complainants, as alleged in the bill, was explicitly based upon a claim of right to sue in a derivative capacity for the Susquehanna Company to recover a sum due to it and not to such stockholders as individuals.

2. The Circuit Court maintained the suit on this theory, and the only decree which it entered directed the payment of a sum to the Susquehanna Company and not to the complainants.

3. The complainants acquiesced in this treatment of the case by taking no appeal from the failure of the Circuit Court to recognize their claim for a lesser sum on the direct guaranty.

4. The Certificate of the Circuit Court of Appeals relates wholly to the right to maintain a stockholders' bill and asks for no instructions as to the lesser right under the direct guaranty.

For these reasons this Court should not confuse a cause of action as to which a decree was entered, with a separate cause of action as to which a decree was denied. The complainants cannot justify their unwarranted assumption of corporate authority in the commencement of this suit by joining with it a separate claim to which on their theory the corporation was not a necessary party. We are confident that this Court will not sustain so easy a method of nullifying the 94th Rule and the principles of equity, upon which it is based.

From this brief statement of the "cause of action," two things are apparent and will, we trust, be borne in mind by the Court in its consideration of the "statement of facts" under which the questions are certified to this Court:

1. The alleged claim which the stockholders of the Susquehanna Company sought by this suit to assert against the

Delaware Company was merely for a debt alleged to be due to the Susquehanna Company for unpaid rentals.

2. Its judicial determination required only the true construction of certain contracts, the execution of which was not disputed.

The ultimate questions which the Certificate herein presents may be briefly stated as follows:

(1) May certain stockholders institute a suit for the benefit of a corporation to enforce its claim against a third party, without first attempting to secure action on the part of the directors and without specifying in their bill and showing by their proofs "the causes of their failure to obtain such action"?

(2) Is the failure to make such attempt excused by the fact that a majority of the Board of Directors of the Susquehanna Company "consisted of persons who were also officers, directors or employees of the Delaware Company?"

(3) Is the added failure of such stockholders to make "any efforts to secure 'such action on the part of the shareholders'" before commencing their suit in behalf of the corporation excused, when neither the bill sets forth nor the proofs show "the causes of their failure to obtain such action", and where it further appears that within four months after the institution of the bill the complaining stockholders at the annual election of the Susquehanna Company secured the co-operation of a majority of such stockholders in the election of a new Board of Directors wholly favorable to the assertion of the claim?

These questions must be decided upon the certificate of facts set forth by the Circuit Court of Appeals. It must be assumed for the purposes of this argument that the certificate fully summarizes the allegations of the bill and the results of the evidence,

so far as the jurisdictional question is concerned. The evidence is not before this Court. The bill and answers are only before the Court to show the "cause of action."

It will thus serve no useful purpose to set forth at length the allegations of the bill which attempt to justify the right of the complainants to sue in a derivative capacity, for the "statement of facts," as certified by the Court of Appeals, expressly finds that :

> *"The bill does not 'set forth with particularity' the efforts of the plaintiffs to secure such action as they desire on the part of the managing directors or trustees." "Nor does the bill set forth any efforts to secure 'such action on the part of the shareholders.'"*

It is equally unimportant to discuss the allegations of the bill, which sought to excuse the failure to secure action on the part of the directors and other shareholders, for the Certificate expressly finds :

> *"Nor did the bill set forth or the proofs show 'the causes of their failure to obtain such action' otherwise than as hereinafter disclosed."*

The subsequent statements in the Certificate thus referred to show merely that a majority of the board of directors of the Susquehanna Company were and had been for some time officers, directors or employees of the Delaware Company, and that six of the thirteen directors did not own or hold in their own right any shares in the Susquehanna Company ; that at the time of the filing of the bill, the Delaware Company owned or controlled 8,840 shares of the 35,000 shares of stock, while the complainants and their associates, who, for six months "had been opposing the administration of the Delaware Company *upon the questions involved in this bill,*" controlled 8,000 shares ; and that as a result of the contest at the annual election, which was held about four months after the filing of the bill, the complainants and their associates polled 15,501 ballots to the 15,441 ballots polled by the administration ticket.

The Circuit Court of Appeals also annexed to their Certificate as "Exhibit B" the original demurrer in the cause filed on behalf of the Susquehanna Company and afterwards withdrawn (Record, pp. 81, 82).

The complainants, in their memorandum upon the motion to advance this cause, claimed that this demurrer went to the "entire merits of the case." An examination of this demurrer (Record, p. 81) shows, however, that the demurrer did not go to the merits of any claim of the Susquehanna Company against the Delaware Company, but only to the question whether the complainants as stockholders were entitled to any relief against the Susquehanna Company, or were entitled to maintain their bill as stockholders on behalf of the Susquehanna Company.

While we believe that the Circuit Court of Appeals would have been justified in adding to this "statement of facts" a number of other considerations tending to deny to the complainants any right to sue in behalf of their corporation, yet we feel constrained to limit our discussion of the questions certified to the "statement of facts" of the Court of Appeals, and therefore insist that counsel for the appellees shall also keep within the facts as certified.

Equity Rule 94.

While the certified questions must be answered by an application of the general principles of equity, yet obviously both questions have especial reference to the application of equity rule 94, regulating procedure in stockholders' suits. That rule is as follows:

> "94. Every bill brought by one or more stockholders in a corporation against the corporation and other parties, founded upon rights which may properly be asserted by the corporation, must be verified by oath, and must con-

> tain an allegation that the plaintiff was a shareholder at the time of the transaction of which he complains, or that his share had devolved on him since by operation of law, and that the suit is not a collusive one to confer on a Court of the United States jurisdiction of a case of which it would not otherwise have cognizance. *It must also set forth with particularity the efforts of the plaintiff to secure such action as he desires on the part of the managing directors or trustees, and, if necessary, of the shareholders, and the causes of his failure to obtain such action.*"

The question involved in this certification is whether complainants complied with the italicized portion of this rule. The question is not only one of pleading, but is essentially one of proof. What must be pleaded, obviously must be proved.

It will be seen that the Certificate closely follows the language of the rule. Its essential averment is:

> "The bill does not set forth with particularity the efforts of the plaintiffs to secure such action as they desire on the part of the managing Directors or Trustees, nor did the proofs show any such efforts, nor does the bill set forth any efforts to secure such action on the part of the shareholders, nor did the proofs show any such efforts, nor did the bill set forth or the proofs show the causes of their failure to obtain such action otherwise than is hereinafter disclosed."

And, as previously stated, the only two facts thus disclosed to excuse the failure of the complainants to obtain action either of the directors or of the other shareholders of the corporation are the facts:

1. That a majority of the directors of the Susquehanna Company were officers, directors or employees of the Delaware Company, and that six of them did not own any shares of Susquehanna stock, except those nominally held to qualify them as directors.

2. That neither the Delaware Company nor the complaining stockholders at the time the bill was filed, owned or controlled a majority of the Susquehanna Company's stock, but that at the next annual election, in a contest involving the precise claim in this suit, the complaining stockholders and their associates proved that it was possible for them to secure a majority of the stock vote of the Susquehanna Company and elect a managing body in sympathy with their views.

ARGUMENT.

We contend that the statement of facts set forth in the Certificate wholly fails, under the uniform rulings of this Court,—

(1) to excuse the complainants from omitting to make preliminary application to the managing body of the corporation to institute such suit to assert a claim which, if it existed at all, was the property of the Susquehanna Company as a corporate entity and not of the complaining stockholders, and

(2) that even if the failure thus to apply to the managing body were excused by the fact that a majority of such managing body were also officers, employees or directors of the Delaware Company, the Certificate wholly fails to disclose any facts which, under the rulings of this Court, would excuse the added failure of the complainants to apply to the stockholders of the Susquehanna Company for action before they usurped its corporate authority and asserted a right due to such corporate entity.

If *either* of these questions is decided in favor of the appellant, the present suit cannot be maintained, and they will therefore be separately discussed under Points Second and Third. The general principles of equity, which govern both questions and of which rule 94 is but an expression and method of application, will be briefly discussed by us under our First Point.

FIRST POINT.

Before a shareholder "is permitted in his own name to institute and conduct a litigation which usually belongs to the corporation, he should show to the satisfaction of the Court that he has exhausted all the means within his reach to obtain within the corporation itself the redress of his grievances or action in conformity to his wishes. He must make an earnest, not a simulated, effort with the managing body of the corporation to induce remedial action on their part, and this must be made apparent to the Court."

This is the general principle of equity as stated by this Court in the leading case of Hawes v. Oakland, 104 U. S., 450, which case resulted in the formulation and announcement of the 94th equity rule. This principle of equity was even then an old one, for the Supreme Court based its action on the earlier English case of Foss v. Harbottle, 2 Hare, 461 (decided in 1843), in which Vice Chancellor WIGRAM, after asserting that a stockholders' suit could not be maintained "without reasons of a very urgent character," further held that there must be a preliminary appeal to the board of directors and, if ineffectual, to the stockholders, as the institution of the suit was for the directors and stockholders to determine.

In the later English case of Macdougall v. Gardiner, 1 Chancery Div., 13, Lord Justice JAMES gave the same reason for the rule:

> "Because there may be a great many wrongs committed in a company—there may be claims against directors, there may be claims against officers, there may be claims against debtors, there may be a variety of things which a company may well be entitled to

> complain of, but which, as a matter of good sense, they do not think is right to make the subject of litigation; and it is the company, *as a company*, which has to determine whether it will make anything that is a wrong to the company a subject matter of litigation, or whether it will take steps to prevent the wrong from being done."

The mere existence, therefore, of a claim,—well or ill founded,—on the part of a corporation against a third party does not of itself justify the action of some of the stockholders in asserting said claim by a lawsuit. They can no more usurp corporate authority in instituting lawsuits than in any other feature of the Company's business. In entering the corporation, they submit their interests as stockholders to the judgment of the majority.

To these considerations, which are fully stated and illustrated by the English and American cases and especially by the decisions of this Court, hereinafter cited and quoted, is added in this country a consideration of even greater importance, and that is the constitutional rights of citizens as to suing and being sued. In the present case, neither the Constitution nor statutes of the United States had given the Federal Courts any jurisdiction to determine this controversy between the Susquehanna and the Delaware Companies (both being New York corporations), *and this bill was an attempt to confer jurisdiction, otherwise without warrant of law.*

It is true that this was not the result of any collusion between the Susquehanna Company and the complaining stockholders. While the collusive suits to confer jurisdiction constituted one of the evils at which Rule 94 was aimed, yet the rule had a fuller purpose and a broader application, and was obviously intended to prevent not only the usurpation of corporate authority but the unconstitutional resort to the federal courts by stockholders who on their individual initiative sought to bring the rights of a corporation into a federal court which would otherwise have been without jurisdiction.

In this aspect, Rule 94 is, in this age of corporate enterprise, of immense importance, for the management of a corporation has frequently no graver responsibility to meet than to determine under what circumstances and in what forum its rights shall be enforced, and if individual stockholders, often in the minority, can, without consulting either their associates or the governing body of the corporation, commit the corporation to litigation in a forum, otherwise without jurisdiction, the constitutional limitation of federal jurisdiction becomes ineffective. It needs no citation of authorities to establish the proposition that the contingencies are few which will justify such usurpation of corporate authority, and where individual stockholders thus virtually take from the Company's managing body the right to initiate suits in its behalf, *they must conclusively show, both by the allegations of their bill and by their proofs that they are within the few exceptions which the Courts have recognized.* They must show that they did in good faith exhaust all their remedies within the corporation, that they made every reasonable attempt to get those to act to whom the corporation had delegated the decision of such a question, and if they have failed to make an attempt within the corporate body to secure such action, *they must further show by specific and unequivocal allegations in their bill and by equally specific and unequivocal facts in their proofs, that any application by them to the governing body or to the shareholders would have been wholly futile and nugatory. If there be doubt as to this, the doubt must be resolved against the individual stockholders.* Whether such futility has been shown in the facts, as certified to this Court, will be considered in the next two points.

SECOND POINT.

The stockholder of a corporation cannot on his individual responsibility commence an action for the benefit of the corporation against another corporation, without first applying to the managing body of his corporation to do so, and the fact that a majority of such managing body are also officers, directors or employees of the corporation against which the suit is sought to be brought will not, in the absence of fraud, excuse the failure of the stockholder to make such application.

The only question which seems open to discussion is whether the mere fact that a majority of such Board were also "officers, directors or employees" of the company sought to be sued, and that some of them had only a nominal stock interest in the Susquehanna Company, *in itself and in the absence of any circumstances of fraud, so conclusively demonstrates the futility of such application as to excuse it.* This conclusion could be justified only on the assumption that there is a *conclusive* presumption of law that the directors of a corporation will not institute a suit against another corporation, with which a majority are identified either as "officers, directors or employees."

Certainly this Court has never held that any such presumption exists. It would be in direct opposition to the general presumption of fidelity, which has been often recognized and acted upon by this Court, and explicitly so in the case of the directors of a corporation in matters connected with Rule 94. Thus in Corbus v. Alaska Company, 187 U. S., 455, it was said :

> **"The directors represent all the stock-"holders and are presumed to act honestly "and according to their best judgment for "the interests of all."**

The claim sought to be asserted by this suit was *not* against the directors of the Susquehanna Company, but against a separate and entirely solvent company, and did not arise from any circumstances of a fraudulent character, but was based wholly upon a new construction of a railroad lease. The certificate does not state that the claim had ever been heard of earlier than six months before this suit was brought (p. 3). Moreover, the claim was not of a character involving any perversion of the corporate powers of the Susquehanna Company, but was merely a suit for rent, which could have been tried in a common law action and the proof of which depended wholly upon the construction to be given by the Court to written instruments, the existence of which was not disputed.

The question in this case is whether there was any insuperable obstacle to the institution of the suit by the corporation itself, simply because a majority of the Susquehanna Company's officers and directors were likewise "officers, directors or employees" of the Delaware Company. The fact, also stated by the certificate, that a number of the directors owned no shares in their own right, but were qualified by shares owned by the Delaware Company, presents no element of illegality. The New York Statute (§ 40 of Stock Corporation Law—Chapter 688 of Laws of 1892) expressly provides that the officers of one corporation which owns stock of another corporation shall be eligible to the office of director in the latter, "the same as if they were individually stockholders therein." On the presumption that directors will honestly and fairly respect the trust committed to them, it is submitted that it must be presumed that any reasonable request as to the bringing and conduct of a suit, which the complaining stockholders might have made, would have been respected. Certainly there is nothing in the Certificate to warrant the conclusion that these directors would have been wanting in their full duty as trustees for the stockholders of the Susquehanna Company.

The vice of the appellees' position is that they gratuitously assume that the directors of the Susquehanna Company, men of recognized standing and probity in the business world, would have been faithless to the trust reposed in them, and this solely for the reason that a majority were, as officers, directors or employees, also identified with the Delaware Company.

Certainly the presumption that directors will fully discharge their duties to all the stockholders should not be overborne at least until they have first refused, upon demand, to bring suit under conditions that will fully safeguard the interests of the stockholders, and until such demand and refusal the ordinary presumption of fidelity to a trust, as announced by this Court, still remains.

That this conclusion is in accord with the consistent ruling of this Court can be seen by a comparison of both those cases in which a stockholder's bill has been sustained and those in which it has been dismissed.

Hawes vs. Oakland, 104 U. S., 450, is so familiar that it requires no further quotation. It is wholly favorable to our contention.

In Detroit vs. Dean, 106 U. S., 537, this Court showed that even a formal declination by a Board of Directors, on demand, to sue, will not justify a stockholders' suit, when it is simulated or collusive. The Court said :

> "A single stockholder in a corporation has undoubtedly the same right to institute legal proceedings against the corporation for the protection of his individual rights that a third party, not a stockholder, possesses; but when he resorts to such proceedings to protect, not simply such interests, but the property and rights of the corporation against the action or threatened action

> of third parties, *thus assuming duties properly devolving upon its directors, he must show a clear breach of duty on their part in neglecting or refusing to act in the matter, amounting to such grossly culpable conduct as would lead to irremediable loss to him if he were not permitted to bring the matter before the courts. And such neglect and refusal must not be simulated, but real and persisted in, after earnest efforts to overcome it.*"

In Dimpfell v. Ohio Ry. Co., 110 U. S., 209, two complaining stockholders filed a stockholders' bill against a railroad, to declare certain bonds which the Company had issued null and void. It did not appear that they had made any attempt to prevent the issuance of the bonds or that they had made any appeal to the Directors not to take the action complained of. Mr. Justice FIELD speaking for this Court, said:

> "Grievances real and substantial must exist, and before an individual stockholder can be heard he must show in the language of this Court that 'he has exhausted all the means within his reach to obtain within the corporation itself the redress of his grievances or action in conformity to his wishes.'"

In Quincy v. Steel, 120 U. S., 241, this Court held that the prerequisite of a demand upon the Board of Directors is not met even by a perfunctory written request. The case well illustrates the degree of "particularity," demanded by Rule 94, which this Court will exact in stockholder's suits, where not only corporate authority, but federal jurisdiction is sought to be usurped by the verbal jugglery of a pleader. The Court said:

> "The rule also requires that he must set forth *with particularity* his efforts to secure action on the part of the managing directors or trustees of the corporation of which he is a member, and, if necessary, of the shareholders, and the causes of his failure to obtain such action. In the case before us he seems to have made but a single effort to induce the directors of the gas

company to institute a suit against the city to recover the money, and this was by a communication in writing addressed to the board, August 1, 1885. No copy of that letter is produced, but it is said that the board of directors laid the communication on the table. No copy of the order of the board upon the subject is produced; no effort at conversation with any of the directors, or any *earnest* effort of any kind upon his part to induce the directors to bring the suit is shown in the bill; no attempt to call the attention of the shareholders to this matter during the four years in which he said he was a shareholder, and during which time the city was failing to pay its debt to the gas company, nor any effort at any of the meetings of the shareholders or of the directors to induce them to enforce the rights of the company against the city, is shown."

In Taylor v. Holmes, 127 U. S., 489, the Court enforced this jurisdictional rule under circumstances which strongly illustrate its extreme indisposition to relax it. Two stockholders had brought a stockholders' suit against their corporation and a third party, to correct a deed made by the third party to the corporation. It appeared that the corporation itself was extinct by limitation of its charter, although it was continued under the laws of New York for the purposes of liquidation. It further appeared that many of the directors of the Company were dead. Nevertheless this Court said:

> "Although the allegation of the bill is that many of the directors of the Company are dead, *still it is shown that one of them survives, and no assertion is made that there was any application to this surviving director on the part of the defendants for the purpose of instituting any proceedings* looking to the rectification of this deed or for the recovery of the real estate in North Carolina; nor does it appear that there was any request made to him to bring any suit either at law or in chancery for that purpose. *No effort was made to call together the stockholders to take any action on the part*

of the Company or to elect other directors or to obtain any united action in the assertion of the claims now set up."

In Corbus v. Alaska Treadwell Gold Mining Company, 187 U. S., 455, the Court again ruled that even circumstances of exceptional hardship would not permit stockholders to usurp the authority of the corporation in the matter of litigation. In this case, some stockholders brought suit against a mining corporation, to enjoin it from paying certain license taxes which were claimed to be unconstitutional. The corporation was engaged in mining in Alaska, for which territory the license taxes were enacted. The directors resided in San Francisco. The plaintiff, as stockholder, therefore averred that he had "not been able, because of the great distance at which the directors of said Company reside," to request them to refuse to pay said taxes and to apply for said license, but had made such a request of the officers or agents of said Company controlling its business in Alaska, but they had failed and refused to make such application, because of the severity of the penalties. This Court said:

> "It must not be understood that a mere *technical* compliance with the foregoing rule is sufficient and precludes all inquiry as to the right of the stockholder to maintain a bill against the corporation. This court will examine the bill in its entirety and determine whether, under all the circumstances, the plaintiff has made such a showing of wrong on the part of the corporation or its officers and of injury to himself as will justify the suit. *The directors represent all the stockholders and are presumed to act honestly and according to their best judgment for the interests of all. Their judgment as to any matter lawfully confided to their discretion may not lightly be challenged by any stockholder or at his instance submitted for review to a court of equity. The directors may sometimes properly waive a*

> *legal right vested in the corporation in the belief that its best interest will be promoted by not insisting on such right. * * * The rule requires that the plaintiff must set forth with particularity the efforts made by him to secure action by the directors.* It does not appear that he made any effort to secure such action, but he relies simply on the distance of the directors from the place where he resides and in which the court is held as an excuse for not applying to them. We are of opinion that the excuse is not sufficient. *He should at least have showed some effort. If he had made an effort and obtained no satisfactory result either by reason of the distance of the directors or by their dilatoriness or unwillingness to act, a different case would have been presented,* **but to do nothing is not sufficient."**

A consideration of the few cases, in which stockholders' bills have been sustained, will show even more strikingly the rule as above stated.

In Dodge v. Woolsey, 18 How., 331 (decided before Rule 94 was added to the Equity Rules), it was shown that the stockholder had requested the Board of Directors to test the constitutionality of a suit " and that it refused to do so "

In Greenwood v. the Freight Co., 105 U. S., 13, the stockholder alleged that

> " he had requested and urged the directors of the Marginal Freight Company to take steps to assert the rights and franchises of the Company against what he believed to be unconstitutional legislation, *and that they had declined and refused to do so.*"

He further set out the formal resolution of the directors making such refusal, and this Court sustained the bill because " *the corporation peremptorily refused to move in the matter.*"

Much reliance was placed by the complainants in the Court below upon the Income Tax Cases. (Pollock v. Farmers' Loan and Trust Company, 157 U. S., 429.) It is true that the bill was maintained, but jurisdiction was assumed practically by

the consent of both parties. Mr. Assistant Attorney-General Whitney, representing the Government, agreed:

> "In view of the great public interest aroused and of the fact that no cases in proper form are now pending, these objections (to the jurisdiction of the action) are waived on behalf of the Government, so far as it is in the power of its officers to waive them."

In the later case of Corbus v. Mining Co., 187 U. S., 455, 459, the Court expressly disclaimed any intention by its opinion in the Income Tax cases to

> "determine to what extent a Court of Equity will permit a stockholder to maintain a suit nominally against the corporation but really for its benefit."

Doctor v. Harrington, 196 U. S., 579, will probably be chiefly relied upon by the appellees, *as it is the only decision in which this Court has sustained a stockholders' suit where no preliminary demand had been made either upon the directors or the stockholders.* The facts, however, in that case were wholly exceptional and bear no resemblance to the facts in the present case. The allegations of the bill disclosed a *fraudulent and criminal conspiracy* engineered by the defendant Harrington to deprive the corporation of its property by a collusive and fictitious judgment. Harrington controlled the corporation, for it was alleged that

> "the voting power on a majority thereof was given to the defendant John J. Harrington, who directed the management of the affairs of the corporation, dictated its policy and selected its directors."

For the purpose of defrauding this corporation, Harrington organized another corporation and thereupon caused the first named corporation to deliver to the second promissory notes representing no consideration and fraudulent in character, upon which Harrington permitted judgment to be taken

by the new corporation against the old. *The officers and directors of the old corporation, on the allegations of the bill, must have been participants in these frauds.*

The bill then averred:

> "The complainants are unable to secure any corporate action on the part of the defendant Sol Sayles Company to redress the wrongs hereinbefore set forth, nor are they able to obtain any redress at the hands of the stockholders of the said defendant Sol Sayles Company. The board of directors of said corporation is under the absolute control and domination of the defendant John J. Harrington, and the said Harrington, by reason of having possession of a majority of the capital stock of the said corporation, likewise controls the action of the stockholders. *Although requested for information with regard to the facts hereinbefore set forth, he has refused to give any information with regard thereto, and has declined to redress the wrongs of which complaint is herein made, or to give to the complainants any opportunity to lay before the board of directors or the stockholders of the defendant Sol Sayles Company the facts herein set forth.*"

On these allegations this Court sustained the bill.

The distinction between Doctor v. Harrington and the case at bar is obvious. The Delaware Company did not own a majority of the stock of the Susquehanna Company, but less than one-seventh of it. The Susquehanna Board of Directors never refused any request for information nor otherwise acted in fraud of the stockholders' rights, as did Harrington and the officers of the corporation. Moreover, the Susquehanna Board never "declined to redress the wrongs of which complaint is herein made," as did Harrington; nor did either it or the Delaware Company deny to the complainants "any opportunity to lay before the Board of Directors or the stockholders" the facts of the controversy, as did Harrington. Moreover, the Harrington case was based upon circumstances

of criminal fraud, while the Delaware Company case is a simple claim for a debt based upon a written contract, and involving only an honest difference of opinion as to its true construction. In the Harrington case, the stockholders exhausted every method of redress within the corporation. They appealed to Harrington to hold a directors' or stockholders' meeting, to prevent the immediate consummation of a criminal fraud upon their rights. In the case at bar, the complaining stockholders never made any demand upon the directors of the Susquehanna Company either for information or corporate action, but acted on their own initiative, wholly on the gratuitous assumption that the directors might be faithless to their trust, because some of them happened to be officers, directors or employees of the Delaware Company. There is not the pretense of any fraudulent conduct or concealment on the part of the directors of the Susquehanna Company. The "statement of facts" in the certificate does not contain a single finding of a fraudulent act on the part of anybody.

In Chicago v. Mills, 204 U. S., 321, the bill averred the formal demand that the directors institute the suit, "and a refusal of the Company to bring action." It was further shown that

> "at the annual meeting of the stockholders of the Company a resolution directing the beginning of the suit was defeated."

For this reason, the bill was sustained.

In *Ex parte* Young, 209 U. S., 123, 143, a stockholders' bill was maintained, but it appeared that the bill was preceded by a formal demand upon the directors and officers of the corporation to institute suit, and a definite refusal to do so on account of the enormous penalties provided by the Act.

In other rate regulation cases, where stockholders' suits were brought, either no point was made by the parties as to the application of Rule 94 or it was waived.

The appellees are in the last analysis driven to contend that the bare assertion in their bill, that any appeal to the directors would have been "idle and nugatory," is sufficient, although there is no finding in the "statement of facts" of the Certificate even hinting at fraud on the part of such directors. Apart from the fact that the bill can be referred to only to show the cause of action, we need only add that if the mere *averment* of futility would excuse a demand, Rule 94 would itself be futile. The pleader's license is like that of the poet, and sometimes disdains facts and substitutes conjectures and innuendoes. In formulating Rule 94 this Court did not intend that it should be nullified by the loose averments and glittering generalities of a zealous pleader. On the contrary, the rule provided that the bill must always "set forth *with particularity* the efforts of the plaintiff to secure such action as he desires on the part of the managing directors or trustees, and, if necessary, of the shareholders, and the *causes* of his failure to obtain such action," and the Certificate herein expressly finds that

> "the bill does not set forth with particularity the efforts of the plaintiffs to secure such action as they desire on the part of the managing directors or trustees, nor does the bill set forth any efforts to secure such action on the part of the shareholders."

As previously stated, Rule 94 itself assumes, in the language of this Court, that "the directors are presumed to act honestly and according to their best judgment for the interests of all," and this presumption cannot be overborne by the mere assertion of futility or by the pleader's license in the use of adjectives or adverbs. The fraud charged and proven must be actual and not constructive. "Epithets do not make out fraud."

Kent v. Canal Co., 144 U. S., 91.
Fogg v. Blair, 139 U. S., 127.

In the last cited case, the Supreme Court held that it was necessary "to state the essential ultimate facts" and not

merely to use conclusions of law, like " fraud," " breach of trust," " colorable " and " scheme."

We close this point with a citation of a number of cases from the State Courts, in which the precise question presented in the case at bar was ruled upon on demurrer to the bill, and in each case the bill was held to be not maintainable.

In Wolf v. R R. Co., 195 Penn., 91, 95, the Court said :

> " But plaintiff relies on his averments of collusion by the directors of the lessor company to excuse the absence of demand upon them. The authorities are agreed that if it sufficiently appears that a demand would be useless, it need not be made. The averments of collusion relied upon by plaintiff are that as the lessee is the owner of a majority of the shares of the lessor, the former elects and controls the action of the officers of the latter, who have, therefore, allowed themselves to be 'kept in absolute ignorance of its business.' The defect of this charge is that it does not rest on any acts averred, but on an inference that by reason of the circumstances of their election, the directors will violate their duty and commit a breach of trust. There is, however, no presumption that officers will commit a breach of trust; the charge should rest on some act affirmative or permissive, manifestly in violation of duty, and not of erroneous judgment. The bill is radically defective, first in not averring a demand and refusal by the corporate officers to bring suit, and secondly, in not averring facts sufficient to excuse the want of such demand, and to meet the requirement that plaintiff must show every reasonable effort to get the corporation to act."

In Siegman v. Maloney, 65 N. J. Eq., 372, the New Jersey Court of Errors and Appeals unanimously held, that the failure of the complaining stockholder to make any preliminary demand upon the directors of his corporation was *not* excused by the alleged facts, that of the twelve directors five were participants in the acts complained of, that another was a

" brother of and connected in business with one of the individual defendants," and that still another was " an employee and representative of one of the other individual defendants." Chief Justice GUMMERE said:

> " But, in our judgment, these facts justify no such conclusion. On the contrary, the presumption is that, notwithstanding the relations existing between the two directors and two of the individual defendants, against whom relief is sought, the former would faithfully discharge the duty which they owed to the corporation and its stockholders, although their action would necessarily have an injurious effect upon the interests of those defendants. *Neither the existence of blood nor of business relationship justifies a presumption of dishonesty under the conditions referred to.*"

In Brewer v. Boston Theatre, 104 Mass., 378, an allegation " that the present board of directors of said defendant corporation are united in the interest of and under the control of said Tompkins and Thayer (the other defendants)," was held insufficient to excuse an omission to make demand upon the directors. The Court said:

> " It does not show that such an application upon a suitable representation of the facts, would prove unavailing."

In Dunphy v. Traveller Ass'n., 146 Mass., 495, the same Court held that an allegation, that one of the directors, who was a party defendant, " controlled a majority of the stock and has elected such persons directors as he chose," did not excuse the failure to make a preliminary demand upon the board. The Court said:

> " It cannot be presumed in the absence of such averments (of fraud or of misconduct) that they would refuse to do their duty if their attention was called to it."

In O'Connor v. Virginia, 184 N. Y., 46, 53, the New York Court of Appeals said:

> "Nor is the allegation that the new directors were 'subservient to the domination and dictation of said Frank Jay Gould and Helen Miller Gould,' sufficient to prove that they would not prosecute against the Goulds a well founded cause of action."

THIRD POINT.

If the complainants were excused under the facts certified from making any preliminary demand upon the directors, they nevertheless must show, in order to maintain their suit, that they could not have secured corporate action by an appeal to the stockholders of the Susquehanna Company.

This point is also based upon the fundamental proposition stated in the language of this Court in our first point, that a stockholder cannot maintain such a suit without first showing

> **"to the satisfaction of the Court that he has exhausted all the means within his reach to obtain within the corporation itself redress of his grievances or action in conformity to his wishes."**
>
> Hawes v. Oakland, 104 U. S., 450.

Applying this fundamental rule, of which Rule 94 is but an expression, it has been uniformly ruled by this Court that except in very exceptional circumstances the complaining stockholder must not only make a demand upon the board of

directors, but if that be denied, he must appeal to the stockholders, in whom the ultimate power is lodged. The rule is as old as the principle of equity which governs stockholders' suits and was stated in the earliest English cases. Thus, in the leading case of Foss v. Harbottle, 2 Hare, 461, upon which the Supreme Court based its leading case of Hawes v. Oakland, 104 U. S., 450, the Vice Chancellor said that

> " it was the duty of the plaintiffs—the two shareholders who complained of what has been done—*to have called a meeting of the shareholders or attended at some regular annual meeting* and obtain the action of a majority on the matters in issue."

This conclusion was based by the Vice Chancellor upon the following practical reason :

> " The majority may have been content with what was done and may have ratified the action of the Board, in which case the whole body would have been bound by it."

Following this doctrine, the Supreme Court in Hawes v. Oakland *(Supra)*, dismissed the bill, because, *inter alia*, the complainants made

> " *no attempt to consult other stockholders to ascertain their opinion or obtain their action.*"

This doctrine has been repeatedly reaffirmed by this Court.

Thus in Huntingdon v. Palmer, 104 U. S., 482, the bill was dismissed, although there had been a demand upon the directors, upon the express ground that :

> " *There is no averment of any effort to invoke the control of the body of the stockholders, or any reason why it was not done.*"

Again, in Quincy v. Steel, 120 U. S., 241, the Court sustained the dismissal of the bill because, *inter alia*, the complainant made

> "*no attempt to call the attention of the shareholders* to this matter during the four years in which he said he was a shareholder * * * *nor any effort at any of the meetings of the shareholders or of the directors to induce them to enforce the rights of the Company against the City.*"

In Chicago v. Mills, 204 U. S., 321, where the bill was sustained, the stockholders of the Company at the annual meeting had expressly refused to instruct the directors to institute the suit.

In Doctor v. Harrington, 196 U. S., 579, where the bill was sustained, the man who committed the alleged fraud had possession of and voting power over the *majority* of the stock and refused on demand to call a stockholders' meeting.

In Dickinson v. Consolidated Traction Co., 114 Fed. Rep., 232, the rule in this respect was well stated by Circuit Judge GRAY in words that are almost literally applicable to the case at bar :

> "But the rule further requires that, if necessary, application should be made to the shareholders for the same purpose. This was not done, and nothing in the evidence, or in the allegations of the bill, appears to excuse the want of such an application. *The allegation that the directors controlled a majority of the capital stock of the Consolidated Traction Company, appears from the evidence to be untrue.* The shareholders, as a body, are not accused of fraudulent or improper conduct in regard to this lease, and though the great majority voted for its confirmation, *it does not lie in the mouths of these complainants, in considering the requirements of this rule, to say what might or might not have been the result of an application made to a regular and lawful meeting of the body of shareholders.*"

Appellees may, however, argue that "the shareholders cannot control a litigation," and it may be conceded that the conduct of litigation primarily belongs to the current business of the managing body. This however is equally true of all the cases above cited, and yet the Court has regarded an appeal to the stockholders as a prerequisite to a stockholders suit. The law under which the Susquehanna Company was incorporated contained the usual clause, which left the management of the corporation to the board of directors. This is true of all corporations and is not inconsistent with direct action by stockholders as to the institution of a suit. Certainly the stockholders had at least two remedies, either of which would have been effective.

1. Assuming that the directors had declined on demand to institute the suit, a resolution adopted by a majority of the shareholders directing them to do so could not have been ignored by the directors without a breach of trust, which would have made them individually answerable in damages.

2. At the time the suit was instituted, the annual meeting was only four months distant in time and at that meeting the shareholders could, *as in fact they subsequently did*, elect directors who were in entire sympathy with the claim against the Delaware Company. As the complaining stockholders, had slept upon their rights for many years, they could reasonably have waited a few more months before taking the law into their own hands by the *dernier resort* of a stockholders' bill.

Presumably an appeal to such stockholders would not have been futile, for when did a majority of stockholders ever seriously object to obtaining larger dividends, and the inevitable result of this suit, if sustained, would have meant larger dividends to the Susquehanna stockholders. The claim was too recent in its invention to have ever been discussed or acted upon at any previous meeting of the shareholders. Apart from the undisputed developments of the subsequent election, which substi-

tute fact for presumption, and show that the complaining stockholders controlled the majority, the condition at the time of the institution of the bill was that the complainants and their associates had almost as many shares of stock as the Delaware Company and its associates, and as they were appealing to the self interest of the remaining stockholders, an appeal to them could not be regarded as presumptively futile. The Certificate states that when the suit was instituted the complainants and their associates (who had formed a protective committee) had 8,000 of the 35,000 shares of stock, while the Delaware Company and its associates had only 8,840 shares. Both factions were in a minority of about equal voting strength, and the remaining stockholders, who held a majority of the capital stock, had taken no part in the controversy. The Certificate expressly states that as a result of the contest the complainants succeeded in obtaining a majority of the stockholders' vote, electing their own board of directors, which promptly admitted the allegations of the bill and co-operated with the stockholders against the Delaware Company. It is therefore incontrovertible that had the complaining stockholders only waited from June until October, this stockholders' suit would have been unnecessary, for if it had not been previously brought by the former management of the Susquehanna Company, it would have been brought in October by the management expressly elected to prosecute this suit. There would, however, have been one difference. The Susquehanna Company would necessarily have proceeded in the Courts of the State of New York and could not have invoked the judicial authority of the Federal Court .

The complainants will argue that their success at the annual election was only made possible by the action of the Susquehanna Company in demurring to their bill The Certificate does not so state, but if it did, that would not establish their

right to institute suit without first making an *attempt* to secure action both by the directors and the stockholders.

We cannot believe that this Court will encourage an unwarranted assumption of Federal jurisdiction in a case where the facts clearly show that such jurisdiction was based upon a mere fiction that the complainants were helpless to secure redress within their corporation.

FOURTH POINT.

For the reasons hereinbefore given, we respectfully submit that this Court should give an affirmative answer to each of the two questions certified by the Circuit Court of Appeals. No hardship, which the complainants have not brought upon themselves by their unwarrantable and premature action, will befall them, for they still control the Susquehanna Company and that Company can therefore proceed in the Courts of the State of New York, the only constitutional forum for this controversy between two New York corporations, and obtain a judicial determination as to the alleged liability of the Delaware Company.

February 23, 1909.

Respectfully submitted,

JAMES M. BECK,

ALFRED OPDYKE,

Counsel for The Delaware and Hudson Company.

APPENDIX.

Certification of Question to Supreme Court.

United States Circuit Court of Appeals, Second Circuit.

Before Lacombe, Ward and Noyes, Circuit Judges.

AETNA INSURANCE COMPANY and Twelve Others, Complainants-Appellees,

vs.

THE ALBANY & SUSQUEHANNA RAILROAD COMPANY, Defendant-Appellee, and THE DELAWARE AND HUDSON COMPANY, Defendant-Appellant.

This cause comes here upon appeal from a final decree of the Circuit Court, Southern District of New York, which directs that the defendant Delaware and Hudson Company (hereinafter called the Delaware Co.) pay to the defendant the Albany and Susquehanna Railroad Company (hereinafter called the Susquehanna Co.) the amount of $1,107,923.24.

The case was fully argued and submitted on briefs. It thereupon developed that there was a question presented whether the bill could be maintained under the 94th Equity Rule. That question is a preliminary one; it has been held to be jurisdictional in character (City of Chicago vs. Mills, 204 U. S., 321; Doctor vs. Harrington, 196 U. S., 579), and this court desires the instruction of the Supreme Court for its proper decision.

Statement of Facts.

The facts upon which the question arises are as follows:

The defendant corporations are both citizens of the State of New York; the complainants are citizens of the States of Connecticut and Rhode Island. The bill was brought to obtain an accounting for various sums of money, which it was alleged became due at intervals

during a series of years from the Delaware Company to the Susquehanna Company as rental or in the nature of rental under a lease made in 1870. For the convenience of all a copy of the pleadings is hereto annexed marked Exhibit "A" which may be referred to for a more detailed statement of the cause of action. The bill does not "set forth with particularity the efforts of the plaintiffs to secure such action as they desire on the part of the managing directors or trustees." Nor did the proofs show any such efforts. Nor does the bill set forth any efforts to secure "such action on the part of the shareholders." Nor did the proofs show any such efforts. Nor did the bill set forth, or the proofs show, "the causes of their failure to obtain such action" otherwise than is hereinafter disclosed.

The complaint was filed on June 12, 1906. The Susquehanna Company was organized under the Act of April 2, 1850, which provides that "there shall be a board of thirteen directors * * * to manage its affairs," and for many years before this suit was brought a majority of the Board of Directors of the Susquehanna Company consisted of persons who were officers, directors or employees of the Delaware Company. At the time this suit was instituted, the directors and officers of the Susquehanna Company, the dates of their election as such, and their relations to the Delaware Company with dates of election were as shown on the following statement:

Names of directors of Susquehanna Company and dates of election as directors and officers.	Position in Delaware and Hudson Company and dates.
Robert M. Olyphant, 1878	Director since 1872 President from 1884 to 1903 Chairman of the Board since 1903
Ge[illegible] I. Wilber, 1883	Director since 1901
David Willcox, 1894 (Vice President, May 9, 1906)	General Counsel 1894 to 1903 Director since 1899 President since 1903
R. Suydam Grant, 1901	Director since 1886
Charles A. Peabody, 1902	Director since 1902

William S. Opdyke, 1903	General Counsel since 1903 Director since 1905
Abel I. Culver, 1903	A Vice President since 1903
Charles A. Walker, 1892	Treasurer 1892
Robert Olyphant, 1887 (President since 1889)	Son of Robert M. Olyphant
William L. M. Phelps, 1873 (Secretary since 1870)	Secretary of the Albany and Susquehanna Company, elected by the Board of Directors
Robert C. Pruyn, 1890	Nominees of the Delaware Company as stated in the Delaware Company's answer.
James H. Manning, 1890	

Of these Robert M. Olyphant, R. Suydam Grant, Charles A. Peabody, William S. Opdyke, Abel I. Culver and Robert C. Pruyn at the time this suit was begun did not own or hold in their own right any shares of stock in the Susquehanna Company, but shares of stock of that company owned by the Delaware Company were transferred to each of them on the books of the Susquehanna Company by the Delaware Company for the purpose of qualifying them as such directors. Charles A. Walker owned five shares of Susquehanna stock from 1901 to 1906; it does not appear that he owned any stock in the Susquehanna Company during the year 1906.

So far as appears from anything shown in this record none of the directors or officers of the Delaware Company ever, before or after the bringing of this suit, treated the claim therein set forth otherwise than as one of doubtful validity the payment of which was to be resisted.

On June 12, 1906, and for thirty years prior thereto, the capital stock of the Susquehanna Company had been fixed at and limited to 35,000 shares. Of this capital stock on June 12th, 1906, the Delaware Company owned 4,500 shares and its directors or officers owned or controlled 4,340 shares; the complainants owned 1,312 shares and a so-called Protective Committee who from and after December, 1905, had been opposing the administration of the Delaware Company upon the ques-

tions involved in this bill controlled 6,688 shares. The entire 35,000 shares were held by 546 different persons, of whom 423 owned 50 shares or less, and of whom 383 resided in the State of New York.

An annual meeting of the Susquehanna Co. was held subsequent to the beginning of this suit, on October 16, 1906. At that meeting the nominees of the Protective Committee were elected, receiving 15,501 ballots, the nominees of the former management receiving 15,441 ballots. About two weeks before such annual meeting the Susquehanna Company being then controlled by the directorate above named, filed a demurrer to the bill which is hereto annexed as "Exhibit B". Copies of such demurrer were sent by stockholders opposed to the existing control to all stockholders and thereafter and before the meeting proxies for several thousand shares were received by the persons who voted for the nominees then elected.

QUESTIONS CERTIFIED.

Upon the facts above set forth the questions of law concerning which this court desires the instruction of the Supreme Court are:

FIRST. "Does the fact that before institution of this suit complainants made no demand for relief upon the Board of Directors of the Susquehanna Company prevent them from maintaining this bill?"

SECOND. "Does the fact that before institution of this suit complainants made no effort to obtain relief at a stockholders' meeting prevent them from maintaining this bill?"

In accordance with the provisions of Sec. 6 of the Act of March 31, 1891, the foregoing questions of law are, by the Circuit Court of Appeals for the Second Circuit, hereby certified to the Supreme Court.

E. HENRY LACOMBE,
H. G. WARD,
WALTER C. NOYES,
Circuit Judges.

[To this Certificate the pleadings are added as an appendix. See Record, pp. 4–83.]

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1908.

No. 416.

THE DELAWARE AND HUDSON COMPANY,
APPELLANT,

vs.

THE ALBANY & SUSQUEHANNA RAILROAD CO., THE ÆTNA INSURANCE COMPANY, AND OTHERS,
APPELLEES.

REPLY BRIEF ON BEHALF OF APPELLANT.

The brief already filed by us has anticipated, and we think fully answered, most of the contentions of the appellees which have been suggested either in their brief or in oral argument. No useful purpose would therefore be subserved by mere reiteration of the principles of law and authoritative decisions of this court which we have cited in the brief already filed. Its decisions should control not only as the court of last resort, but because the question at issue turns principally upon the salutary rule of equity, which this court itself promul-

gated to prevent just such abuse of a stockholders' suit as is presented by the case at bar.

This reply brief will be mainly devoted to three propositions of the learned counsel for the appellees upon which, both in their brief and in the oral argument, they chiefly rely. These propositions are as follows:

> (1) That under the lease and supplemental lease the Delaware Company covenanted to pay the rent *directly* to the bondholders and stockholders respectively of the Susquehanna Company, and that there was therefore privity of contract between the Delaware Company and the complaining stockholders with respect to the claim now in suit.
>
> (2) That a preliminary demand upon the managing body of the Susquehanna Company to bring suit was excused because such managing body could not litigate the claim against the Delaware Company without perpetrating a fraud on the court.
>
> (3) That an appeal to the stockholders to cooperate in the institution of the suit was unnecessary, as the stockholders were without any corporate authority or function with respect to the conduct of litigation.

These propositions, by which the appellees attempt to excuse their failure to comply with Rule 94, will be treated in their order.

I.

APPELLEES' FIRST CONTENTION.

That under the lease and supplemental lease the Delaware Company covenanted to pay the rent directly to the bondholders and stockholders respectively of the Susquehanna Company, and that there was therefore privity of contract between the Delaware Company and the complaining stockholders with respect to the claim now in suit.

We have already shown in our principal brief (pages 4-7) that no such question is before this court. We then referred to a special and minor claim in the bill that the small surplus which was found to exist in the Albany Loan Sinking Fund account in 1902, and amounting with interest to $16,240.52, might be distributed directly to the stockholders under the guarantee of the nine (9) per cent. dividends, which under the supplemental lease commenced after the liquidation of the Albany loan. Apparently the counsel for the appellees have abandoned this contention, but—naturally apprehensive as to the application of Rule 94 to their stockholders' suit—they now attempt to sustain their suit upon the broader ground that as to its subject-matter there was a direct undertaking of the Delaware Company to distribute the sum in dispute directly to the stockholders thereof, and it is therefore suggested that the Susquehanna stockholders had such a direct contractual relation with the Delaware Company that this suit was in substance and effect not a stockholders' suit, but a suit upon a direct contract with the Susquehanna stockholders in their individual right. This

fanciful view has absolutely no support whatever in the terms of the agreement, and even if it had, the question is not before this court, for the only question as to which the Circuit Court of Appeals desires the instructions of this court is as to the right of these complaining stockholders *to sue in behalf of the Susquehanna Company for a debt alleged to be due to it.* While this is so, we will, however, briefly show how absolutely without foundation the suggestion is that as to the amount in controversy there was any obligation on the part of the Delaware Company to pay directly to each stockholder of the Susquehanna Company his proportionate share thereof.

The lease upon which the claim was based itself negatives any such suggestion. After providing that the Delaware Company would pay the interest charges upon the mortgage bonds, it further provides that the Delaware Company would

> "upon the first days of July and January in each year pay a semi-annual dividend of 3½ % upon the then existing shares of the capital stock of the said party of the first part, not exceeding 25,000 shares, and if so many shares do not exist at the time of any such payment or if the sums required for the payments before mentioned shall not amount to the aforesaid $490,000, the balance not applied to the payment of such interest and dividends shall be paid *to the said party of the first part* (the Susquehanna Company) it being understood, however, that the interest and dividends to be paid *as aforesaid* shall and may be paid directly to the respective bond and stockholders" (Rec., pp. 27, 28).

If there was any contention that we had failed to pay the seven (7) per cent. annual dividends thus provided for

(which were, under the supplemental lease, subsequently increased to nine (9) per cent. after the liquidation of the Albany Loan) there would be much force in the suggestion that each stockholder could, under his guarantee of such seven (7) per cent. dividends until 1903 and nine (9) per cent. dividends thereafter, sue the Delaware Company directly for them. The guarantee upon which suit would have been brought is as follows:

> "The President, Managers and Company of the Delaware & Hudson Canal Company, hereby, for value received, guarantees the payment of a semi-annual dividend of three and a half per cent upon the stock represented by the within certificate to be paid on the first days of January and July in each year, until the Albany City Bonds, which were loaned to the Albany and Susquehanna Railroad Company, to the amount of one million of dollars, shall be paid, by the operation of the sinking fund provided for their payment, and thereafter the said Canal Company guarantees to pay upon said stock *four and a half per cent semi-annually on the same days,* subject to the conditions and provisions of the lease made by said Railroad Company to said Canal Company, dated February 24th, 1870, and of an agreement supplemental thereto, dated the 7th day of March, A. D. 1876" (Rec., p. 38).

There is, however, no contention that the seven (7) and nine (9) per cent. dividends were not in point of fact paid, *and this suit was not brought to recover these dividends;* on the contrary, the bill directly states that they were, for it says, Section —:

> *"And your orators show that the said defendant, Delaware Company, has paid dividends, at said rate*

(9 per cent.) upon and since the first day of January, 1903, and that prior to said date, the said defendant paid dividends on said stock at the rate of seven (7) per cent., and no more" (Rec., pp. 17, 18).

While the bill did claim that the nine (9) per cent. dividends had not been paid as soon as the Albany City Loan was liquidated, this question was eliminated from the controversy, although it appeared that a small surplus remained in the Sinking Fund account, which at the time the Circuit Court rendered its decision was found by the Circuit Court Judge to be $23,896.02, and this sum was subsequently reduced on a reference to the Master, by agreement, to a sum, which with interest, amounted to $16,240.52. Whether this sum could have been paid as a part of the guaranteed dividends was not decided, for the Circuit Judge held that it was in any event due to the Susquehanna Company, and the $16,240.52 therefore became a part of the amount adjudged to be due the Susquehanna Company, which as stated was $1,107,923.24. For confirmation of these statements, which are only stated because of the obvious tendency of the appellees' brief to confuse the nature of the suit, we respectfully refer to the opinion of the Circuit Court as reported in 156 Federal Reporter, 132, of which we presume the court will take judicial cognizance for any proper purpose.

The opinion will show further, that with the exception of this relatively insignificant sum, *the entire sum adjudged to be due the Susquehanna Company was the amount of savings effected by the refunding of the Susquehanna mortgage loans;* and as to this, the lease and supplemental lease can be searched in vain for any covenant on the part of the Delaware Company to pay them directly to the Susquehanna

stockholders. Indeed, the very clause of the lease upon which appellees' claim was based, provided expressly that

> "If the sum required for the payments beforementioned shall not amount to the aforesaid $490,000.00, THE BALANCE NOT APPLIED TO THE PAYMENT OF SUCH INTEREST AND DIVIDENDS SHALL BE PAID TO THE SAID PARTY OF THE FIRST PART" (Susquehanna Company).

The "payments before mentioned" were the interest charges and the *fixed* 7 per cent. dividends.

And the bill itself averred:

> "Your orators further show that upon the retirement of bonds secured by the earlier mortgages above mentioned by later bonds bearing a lower rate of interest, the lessee was bound, under the provisions of said lease, to pay TO THE SUSQUEHANNA COMPANY the amount which it was then relieved from paying as interest upon said bonds; but your orators show that the defendant Delaware Company has failed and neglected so to do, but it has kept and retained to its own use all saving of interest so made."

The Circuit Court therefore simply followed the allegation of the bill, as well as the language of the lease, in decreeing that the amount was payable, if at all, TO THE SUSQUEHANNA COMPANY and not to the stockholders, and it is therefore the right of the Susquehanna Company to determine whether it will distribute it among its stockholders in the form of dividends, or use it in the payment of its indebtedness, or for any other purpose authorized by its charter. Certainly individual stockholders cannot insist upon a division of such assets until the majority, acting through its managing body,

shall determine *when and how* the fund in question shall be divided.

While all this is made necessary by the insistent attempt to suggest that the claim in controversy is a sum which the Delaware Company guaranteed to pay to the stockholders in their individual right, yet, we again insist that even if there was any clause in the lease which supported this contention, *that question is not before this court.* The Circuit Court of Appeals, in its memorandum authorizing this certificate (reported in 159 Federal Reporter, 1022), expressly reserved all questions except the one question which was certified, and as it was admitted that this suit was brought by individual stockholders to assert a right *in behalf of their corporation,* and as the judgment of the Circuit Court (from which no appeal was taken by appellees) *was the recognition of this derivative right,* and as the Circuit Court of Appeals in its request for instructions has described this bill as the assertion of a right *due to the Susquehanna Company* and requested instruction with respect thereto, this court has only before it the question whether the bill, to the extent that it was a stockholders' bill, was properly brought under the allegations of the bill and the proofs. This fact is made perfectly clear by the certificate itself, for while the question certified refers to the right of the appellees to maintain "this bill," the Circuit Court of Appeals had already described "this bill" as follows:

> "The bill was brought to obtain an accounting for various sums of money which it was alleged became due at intervals during a series of years from the Delaware Company TO THE SUSQUEHANNA COMPANY as rental or in the nature of rental under a lease made in 1870" (Record, p. 1).

The learned counsel for the appellees admits both in his brief and in the oral argument that all of the claim was due to the Susquehanna Company *in its corporate right,* but he sought to make a distinction between the corporate right of the Susquehanna Company to the *payment* of the rent and the *physical division* of such rent among the stockholders. Even if there was any provision in the lease which imposed the duty upon the Delaware Company to divide this portion of the rent among the Susquehanna stockholders—which there is not—the distinction between the right to *payment* and the *physical division* of the sum paid is much too fanciful and metaphysical for recognition in a stockholders' suit. IN SUCH A SUIT, THE POINT IS WHETHER THE STOCKHOLDERS ARE SEEKING TO ENFORCE, UPON THEIR INDIVIDUAL RESPONSIBILITY, A RIGHT DUE TO THEIR CORPORATION. If so, they must sustain it only upon the very urgent grounds set forth in *Hawes vs. Oakland* and Rule 94. As it is therefore admitted that the Susquehanna Company alone had the right to such *payment,* it would not be important whether the Delaware Company was under obligation to pay the money into the treasury of the Susquehanna Company, or in its behalf to divide it as the representative of the Susquehanna Company among the stockholders, for the equitable principle involved is whether a RIGHT to payment of rental, which concededly the Susquehanna corporation could exercise or forbear to exercise, could be exercised by certain stockholders *upon their individual responsibility,* simply because on their theory after the right was exercised the Delaware Company could have physically paid the amount involved directly to the stockholders for the benefit and in behalf of

their corporation. From this statement, it must not be assumed that we, in any way, concede any contract duty on the part of the Delaware Company to distribute this fund to the Susquehanna stockholders. The lease and supplemental lease can be searched in vain for any such undertaking. The Delaware Company did agree to pay directly to the stockholders seven (7) and later nine (9) per cent. dividends, *and this admittedly it has done;* and according to the appellees' contention, it further agreed that after the payment of such interest charges and *fixed* dividends, it would pay any balance TO THE SUSQUEHANNA COMPANY. As the sum in controversy is claimed to be a part of this balance, there was, as to such sum in controversy, no direct guarantee or contract whatever between the Delaware Company and the Susquehanna stockholders.

II.

APPELLEES' SECOND CONTENTION.

That a preliminary demand upon the managing body of the Susquehanna Company to bring suit was excused because such managing body could not litigate the claim against the Delaware Company without perpetrating a fraud on the court.

The learned counsel for the appellees earnestly argued that as a majority of the Susquehanna board were officially connected with the Delaware Company, no suit could be brought by them because no court would "entertain litigation in which both sides are controlled by one *dominus litis.*"

For this proposition, they chiefly rely upon *South Spring Gold Company vs. Amador Gold Company,* 145 U. S., 300. The case is not controlling as it is clearly distinguishable in its facts. In that case two companies had litigated a claim, an appeal had been taken to this court, and after the appeal the owners of the company, which was the plaintiff in error, acquired the *ownership* of the company which was the defendant in error. Of this they duly informed this court and stated that for the benefit of certain minority stockholders, they preferred to litigate the question, although the controlling owners of both companies were the same. The defendant in error filed no appearance in this court, but the brief which it had filed in the lower court before ownership was passed was submitted to this court. Under these circumstances, this court held that it would not permit the litigation to proceed, as there was no substantial antagonism between the two companies, IN VIEW OF THEIR COMMON OWNERSHIP.

The difference between that case and the case at bar is plain. There is no suggestion that the Delaware Company owned a majority of the stock of the Susquehanna Company, or that the two companies therefore had common owners, or that a suit, if one had been brought by them, would have been litigated BY A COMMON OWNER. On the contrary, the certificate clearly establishes that the Delaware Company owned less than ONE-SEVENTH (1/7) of the Susquehanna Company, and any suit therefore between the Susquehanna Company and the Delaware Company would have been conducted, not only between two separate corporate entities, but also between two entities, the controlling ownership of which was in different parties.

If the doctrine of *South Spring Gold Company vs. Amador Gold Company* were applicable to the case at bar, it is difficult to see how even this stockholder's suit could be brought, for the case is cited to justify the proposition that there can be no litigation between two corporations if they have a common controlling ownership. Therefore *if* the Delaware Company had owned a majority of the Susquehanna Company, on the contention of the appellees, a suit between them would have been a fraud upon the court, and it is difficult to understand why, on that theory, it would have been less a fraud if brought by the stockholders than by the corporation itself, for in either event, the controlling ownership of both corporations would have been in the same party. However, it is not necessary for this court to determine how two corporations, having a common ownership, can litigate their difference, for in this case, THERE IS NO SUCH COMMON OWNERSHIP, and there was therefore no insuperable obstacle to a suit between the Susquehanna and the Delaware Companies with respect to this claim.

Certainly, the *South Spring Gold Company case* (*supra*) is not authority for the proposition that if two corporations happen to have, in whole or part, the same board of directors, that a suit between them is a fraud upon the court, even though the ownership of both rests in different parties. To hold this, would be to close the doors of the courts upon many corporations in these days of close intercorporate relations. If, for example, the great railway systems of the country be taken, in many cases the legal adjustment of honest differences of opinion between different corporations having intercorporate relations would be difficult, for it is a very common thing for many boards of directors of affiliated corpora-

tions to have in part the same directors, and there has never yet been discovered any practical difficulty about an honest adjustment of their differences through litigation. Would it, for example, be contended that the Union Pacific Railroad Company could not, without a fraud upon the court, sue the Southern Pacific Railroad Company to adjust some legal question, merely because the boards of both were in whole or part composed of the same persons?

The complete answer, however, to the contention is that even if the mere fact that a majority of the Susquehanna board were connected, as officials or employees, of the Delaware Company was a *temporary obstacle* to any suit between the two corporations, IT WAS, NEVERTHELESS, THE PLAIN DUTY OF THE COMPLAINING STOCKHOLDERS, BEFORE ACTING ON THEIR INDIVIDUAL RESPONSIBILITY, TO BRING THE CLAIM TO THE ATTENTION OF THE SUSQUEHANNA BOARD, AND TO ASK THEM TO TAKE SUCH REMEDIAL ACTION BY RESIGNATION OR OTHERWISE AS, ON THE APPELLEES' THEORY, WOULD MAKE LITIGATION POSSIBLE.

The vice of appellees' argument throughout is the theory that the only duty which rested upon the individual stockholders was to demand that the Susquehanna board commence the suit, and that if such suit could not be brought by the Susquehanna board, no further duty was imposed upon the individual stockholders. But this is plainly contrary to the ruling of this court in *Hawes vs. Oakland,* in which the duty of the complaining stockholders was not limited merely to a formal demand that suit should be brought, but imperatively required that such individual stockholder should exhaust "ALL THE MEANS WITHIN HIS REACH TO OBTAIN WITHIN THE CORPORATION ITSELF THE

REDRESS OF HIS GRIEVANCES OR ACTION IN CONFORMITY TO HIS WISHES."

Such redress of grievances, in the case at bar, may have required, if the appellees' contention as to the inability of the Susquehanna board to sue be sound, the resignation of the Susquehanna board; or it may have required such action by the Susquehanna board as would insure the *bona fides* of the litigation and place it beyond the suspicion of being prejudiced by any action of an unfriendly board.

But no attempt of this kind was made, and there is nothing in the certificate to show that had the complaining stockholders requested the Susquehanna board either to resign or to put the conduct of the litigation in the hands of those who were disinterested, that such demands would not have been fully complied with. The presumption is that it would have, and in the absence of any finding of fact in the certificate to the contrary, this court must assume for the purposes of answering these questions, that had the complaining stockholders made any attempt to secure remedial action from the Susquehanna board, that that Board would have *complied with every reasonable request to insure the fair assertion of this disputed claim.*

Corbus vs. Mining Co., 187 U. S., 455.

III.

APPELLEES' THIRD CONTENTION.

That an appeal to the stockholders to co-operate in the institution of the suit was unnecessary, as the stockholders were without any corporate authority or function with respect to the conduct of litigation.

It may be fairly questioned whether the premise upon which this contention is based is sound. The law under which the Susquehanna Company was organized simply provides that "there shall be a board of thirteen directors to manage its affairs." This language is very general and does not necessarily imply any more than that in the interim between stockholders' meetings the board of directors shall have the usual powers of management over the affairs of the corporation. If the stockholders, as the owners of the property, saw fit to take corporate action at an annual or special meeting, with respect to any detail of the company's business, we think that the board of directors would not find it easy to convince a court that the very general and usual provision that they should "*manage*" the affairs of the corporation was exclusive of any action by the owners of the property to whom they stood in a trust relation.

Assuming, however, for the purposes of the argument, that the contention as to the limited powers of the shareholders is well founded, it yet fails to meet the contention of appellant, for it must be remembered that in a stockholders' suit courts of equity are compelled to deal with an *anomalous* condition of affairs, in which to prevent the perpetration of fraud theoretical corporate functions are to some extent disregarded.

Certainly there can be no contention that under the organic law of the corporation there was any power on the part of these *individual stockholders* to "manage" its affairs in the matter of the assertion of a right and the institution of a suit.

If sole regard is to be had to the legal distribution of corporate powers, then it is clear that the complainants were wholly without any legal justification for their interference with the management of the company which, on their contention, was exclusively vested in the board of directors. A court of equity, however, with its visitatorial power over corporations, to prevent wrong or fraud, so far permits a departure from the law of the corporate being as to permit, under extraordinary and urgent circumstances, the individual stockholders to do that which, theoretically and legally, the corporation itself *alone* can do. This being so, would not a court of equity equally recognize the power of ALL the shareholders to act with reference to the assertion of a corporate right where, under extraordinary circumstances, the managing body is either incapable or unwilling to assert such right? In other words, does not the contention that an appeal to the shareholders was unnecessary, because of their want of corporate authority, reduce itself to this absurdity, that while an appeal to ALL of the stockholders was unnecessary, because they had no legal power to do anything in the assertion of this claim, yet one stockholder could, without consulting his fellow stockholders, institute the suit and assert the disputed right on his individual responsibility?

The point, however, is not whether the stockholders had any corporate right to institute the suit, but whether their *command* to their trustees (the managing body) would not

have been practically potent to secure the action that was desired, and, if not, would not the failure of the managing body to respect the command of their *cestuis que trustent* move the conscience of the chancellor to enable ALL the stockholders to do that which ordinarily may be the corporate function of the managing body. If, therefore, the stockholders had a standing in equity to require their trustees to do a given act, or, in default thereof, to do it themselves, *must not a minority of such stockholders, before committing the majority to a course which the majority may perhaps disapprove, first consult the majority as to whether it is for the good of the corporation as a whole that a given right should or should not be exercised, and if exercised, how, when, and where?*

That this reasoning is sound is clearly shown by the express terms of Rule 94, the decisions of this court thereunder, and the English cases upon which it is based. We can only wonder at the courage of the learned counsel for the appellees in their assertion (page 52) that:

> "There is no case in the reports of Federal courts in which a bill has been dismissed for want of a demand upon stockholders for a resolution directing legal proceedings on behalf of the corporation."

We need not repeat the quotations from the decisions of this court in our main brief (pages 28 to 32), in which this court has *repeatedly* dismissed bills, and assigned as one reason the failure of the complaining stockholder to consult his fellow stockholders, either formally or informally, before the institution of the suit. To the same effect are the English cases, for the leading case of *Foss vs. Harbottle,* 2 Hare, 461, was decided, *inter alia,* upon the express ground that—

> "It was the duty of the plaintiff—the two shareholders who complain of what has been done—*to have called a meeting of the shareholders, or attended at some regular annual meeting, and obtain the action of a majority on the matters in issue.*"

Vice Chancellor Wigram added as a reason for the rule:

> "The majority may have been content with what was done and may have ratified the action of the board, in which case the whole body would have been bound by it."

Hawes vs. Oakland, 104 U. S., 450, as a result of which Rule 94 was promulgated, says:

> "If time permits or has permitted, he (the complaining stockholder) must show, if he fails with the directors, *that he has made an honest effort to obtain action by the stockholders as a body in the matter of which he complains,* and he must show a case, if this is not done, why it could be done, or it was not reasonable to require it."

Rule 94, in terms, requires appeal to the stockholders, for, speaking of a stockholders' bill, it provides:

> "It must also set forth with particularity the efforts of the plaintiff to secure such action as he desires on the part of the managing directors or trustees, and, if necessary, *of the shareholders,* and the causes of his failure to obtain such action."

Assuming however that the shareholders had no direct corporate power with reference to the assertion of this disputed claim and the institution of this right, yet, admittedly, they had *indirectly* a very *potent power,* for it is not ques-

tioned that at the annual meetings the shareholders elected the directors, and therefore when this court considers, under the doctrine of *Hawes vs. Oakland,* whether these complainants exhausted *all* their remedies to obtain the "redress of grievances" within the corporation, it must determine whether, within the corporation, there was not the effective remedy of electing a new board to assert this claim, if the old managing board were unwilling to assert it.

Of course, if it can be shown as in *Doctor vs. Harrington,* 196 U. S., 579, and *Citizens' Savings and Trust Co. vs. Illinois Central Co.,* 205 U. S., 46, that the party sought to be sued owned a *majority of the voting power* of the corporation, the futility of an appeal to the shareholders would be obvious. But it is not disputed here that the Delaware Company did not own or control even *one-fourth* of such voting power, and the ability of the complaining stockholders, by reasonable effort, to secure a redress of their grievances within the corporation by the election of a board in harmony with their views, does not in this case rest upon presumption or conjecture, but upon *an accomplished fact.*

As it is therefore plain that there was this potent remedy within the corporation, and that no attempt was made to exercise it before the bill was filed, but that an attempt was made to exercise it after the bill was filed, it seems to follow as a necessary conclusion that the bill was prematurely brought, and that by this abuse of the stockholders' privilege, *a federal court was given jurisdiction of a controversy of which it otherwise would have had no jurisdiction whatever.*

As we have said, the two cases upon which the counsel for appellees rely to excuse their failure to apply to the

stockholders as well as to the directors, are *Doctor vs. Harrington*, 196 U. S., 579, and *Citizens' Trust Company vs. Illinois Central Company*, 205 U. S., 46.

We have fully shown in our main brief, pages 22 to 24, the radical distinction between the facts in *Doctor vs. Harrington*, where Harrington controlled *the majority of the stock of the corporation* in whose name the suit was sought to be brought, and *refused after demand to call either a stockholders' or directors' meeting*, and the case at bar where no such contention is made. There was, therefore, an appeal to the majority stockholder in the *Doctor vs. Harrington* case.

So far as the *Citizens' Trust Company vs. Illinois Central Company* is concerned, the same distinguishing fact appears that any appeal to the stockholders would have been futile because the company sought to be charged *had acquired by purchase the voting power of a large majority of the stock of the corporation* in whose right the claim was sought to be asserted (Record of case in Supreme Court, pp. 7, 9).

It furthermore appeared that The Illinois Central R. R. Co. had, by virtue of such voting power, elected a Board of Directors of the Belleville Company, "for the purpose of carrying out the fraudulent and unlawful plans and designs of said Illinois Central R. R. Co." (*Id.*, p. 10).

That said Board of Directors had *passed resolutions* "to authorize the said sale and transfer" of the property of the Belleville Company for an inadequate consideration (*Id.*, p. 10).

That thereafter a special meeting of the stockholders of the Belleville Company was held, at which the said "actions

and resolutions" of the Board of Directors of the Belleville Company were *ratified and confirmed* by the votes of the very shares, more than two-thirds in numbers "acquired, held and controlled as aforesaid by the said Illinois Central R. R. Co." (*Id.*, p. 10).

Therefore the bill alleged:

"That a demand upon the directors or officers of the "corporation itself to bring the present suit would have been "vain and futile for the many reasons heretofore set forth in "this bill of complaint" (*Id.*, p. 14).

It, therefore, appears in the case of *Citizens' Savings & Trust Co. vs. Illinois Central R. R. Co.* (1) that the board of directors of the Belleville Company had themselves participated in active frauds upon the complainant, and (2) that the third party defendant held the absolute voting-power over more than two-thirds of the stock of the Belleville Co. No one ever supposed that a demand upon either directors or stockholders was required under such circumstances. We do not think that counsel for appellees would have ventured to cite this case upon their brief, with the prominence with which they have, if the contents of the bill had been quoted or even stated in the opinion of the Court.

The counsel for appellees also seem to place much reliance upon the case of *Brewer vs. The Boston Theater*, 104 Mass., 378, 387. Thus on pages 11 and 40 of Appellee's Brief the following quotation from that case is made:

> "Where the stockholders retain no control of the corporate business, except by means of an annual election of officers, those officers, during their term of service, represent the corporation for all purposes; and a refusal by them to take proper action for the protection of its interests, or to allow the use of the

> corporate name for that purpose, ought to be sufficient to justify a proceeding in behalf of the individual stockholders, making the corporation a party defendant."

As a matter of fact, the same case came back to the Massachusetts court, after amendment of the bill, and the court "upon further consideration" (104 Mass., 392, 393) said as follows:

> "The question then comes, whether, in a case which admits of delay for the purpose of attempting to correct or redress the alleged wrong through the action of the corporation in its own behalf, such attempt must not first be made, or shown to be useless. We are inclined to hold that it must. The directors represent the corporation for the time being; *but they are not the corporation.* Annual meetings, even if special meetings are impracticable, secure to the corporators ample means of correcting abuses practiced by their officers, so far as correction is desired by the majority, or by the corporation as a body. It is not to be presumed that the body of the corporators will tolerate a wrong in their elective officers, by which they are themselves defrauded. That the present board of directors sustain or participate in the wrong, and refuse to act, or prevent action in the name of the corporation, delays the initiation of proceedings for its correction or redress. But if the delay is only temporary, and does not defeat or endanger the securing of proper redress ultimately, it does not create that necessity which is the warrant for this mode of proceeding."

We therefore contend that whatever view this court may take as to the duty or futility of a demand upon the manag-

ing body, the failure to make any attempt to obtain remedial action from the shareholders, who were quite as much interested as the complaining stockholders, is fatal to the maintenance of this bill, and upon this ground alone the bill should be dismissed.

IV.

Have the Appellees shown that they "exhausted all the means within their reach to obtain within the corporation itself the redress of their grievances or action in conformity to their wishes?"

In our oral argument we called attention to the fact that even if the contentions of the appellees were correct that an appeal to the managing body to commence this action was futile, it did not meet the requirements of the 94th Rule, or the doctrine of *Hawes vs. Oakland*. In other words, the demand upon the managing body to bring suit is not the only preliminary requisite to a stockholder's suit. The equitable doctrine is much broader and requires, in the language of this court in *Hawes vs. Oakland*, that the complainants shall exhaust "all the means to obtain within the corporation itself" remedial action, and that they cannot justify a stockholder's suit until they have shown that everything that they might reasonably have done was in point of fact done, and had failed.

Assuming for the purposes of the argument that the managing body of the Susquehanna Company could not itself litigate this question with the Delaware Company it is reasonable to ask what could the complaining stockholders

have done to obtain a "redress of their grievances" within the corporation, and what could the board of directors have done to redress such grievances. What the directors could have done, and therefore what the complaining stockholders could have asked them to do, is as follows:

1. They could have appointed a committee of their own number, composed of directors disconnected with the Delaware Company, with authority to deal with the claim. (This course was approved by the New York Court of Appeals in *Continental Ins. Co. vs. N. Y. & Harlem Co.*, 187 N. Y., 225.)

2. They could have submitted the matter to independent counsel to examine the claim, and then have submitted his report to a special meeting of stockholders for instructions.

3. They could have authorized the demanding stockholders to sue in the name of the Susquehanna Company by their own counsel.

4. Several of them could have resigned, stockholders wholly disconnected with the Delaware Company being elected as their successors, so as to leave only a minority of the whole board identified with the Delaware Company.

Any one of the courses indicated would have fully met every reasonable requirement of the situation, and would have obviated all possible objection as to a suit between common directors.

To all this, the only reply of the learned counsel for the appellees was that what the directors would have done, had such attempt been made to obtain a redress of grievances, is sufficiently indicated by that which the learned counsel insinuated that they had done.

We answer that the appellees cannot excuse their unquestioned failure to exhaust their remedies within the corpora-

tion by a sneering innuendo that the efforts in any event would have been futile. There is nothing in this certificate to show that the directors would not have met any reasonable wish that the complaining stockholders might have made with reference to the assertion of this claim; and on the authority of *Corbus vs. The Alaska Gold Mining Company,* and quoted in our main brief (pp. 20 and 21), the directors *"are presumed to act honestly and according to their best judgment for the interest of all."* To hold, upon mere conjecture, that the directors would not have complied with any reasonable request with respect to the proposed litigation is, in effect, *to condemn them before they have committed any wrong.*

This court, by Rule 94 and the equitable doctrine of *Hawes vs. Oakland,* has declined to justify the usurpation of corporate authority upon mere conjecture or innuendo. It has held that "the proof of the pudding must be in the eating," and that it does not lie in the mouth of men, who have made no demand or request, to assume gratuitously that if the demand or request had been made that they would have been ignored. Upon the conceded failure of the complaining stockholders to obtain the remedial action which we have indicated within the corporation, this court should answer both questions certified in the affirmative.

V.

The Appellant's Contention is not a Mere Technicality.

The case of the Delaware Company is not to be regarded as merely technical. *It is one of substantive right.* It made its contract with the Susquehanna Company and not with

each of its five hundred stockholders. It can fairly challenge the right of an individual to sue it on a claim, due, if at all, to a distinct corporate entity.

Moreover it is its CONSTITUTIONAL RIGHT to litigate this suit with another New York corporation in the New York courts, and of this RIGHT it has been most unjustly deprived by a premature and unwarrantable suit, brought by thirteen individuals, with whom as to the claim in controversy it made no contract and to whom as individuals it owes nothing. This court therefore should not look upon this suit with the unfavorable prepossession to which a mere technicality naturally gives rise, but in vindication of our substantive RIGHTS and of its own salutary rule of equity procedure, it should require the appellees to justify beyond doubt or cavil their usurpation of a power admittedly that of the Susquehanna Company.

Moreover, this Court should remember that to relax Rule 94 by permitting a stockholders' suit where the complaining stockholders *make no effort whatever* to obtain redress within the corporation would inevitably have the effect of further burdening this and other already overburdened federal courts with suits whose true forum is the court of the State of the contending corporations.

JAMES M. BECK,
ALFRED OPDYKE,
Counsel for Appellant.

WASHINGTON, *February* 25, 1909.

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Office Supreme Court, U. S.
FILED.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1908

No. 416

THE DELAWARE AND HUDSON COMPANY,
Defendant-Appellant,

against

ALBANY AND SUSQUEHANNA RAIL ROAD COMPANY,
Defendant-Appellee,

AETNA INSURANCE COMPANY, et al.,
Complainants-Appellees.

Certificate from Circuit Court of Appeals,
for the Second Circuit.

BRIEF AND ARGUMENT

For Complainants-Appellees.

E. PARMALEE PRENTICE,
For Appellees.

GEORGE WELWOOD MURRAY,
CHARLES P. HOWLAND,
Of Counsel.

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BRIEF AND ARGUMENT

For Complainants-Appellees

On June 12, 1906, the Aetna Insurance Company and other complainants in this case, stockholders in the Albany and Susquehanna Rail Road Company, filed their bill in chancery in the Circuit Court of the United States for the Southern District of New York against the Susquehanna Company, and The Delaware and Hudson Company, its lessee, praying for an accounting of unpaid rent. The case is reported in the Circuit Court under the name *Aetna Insurance Co. vs. Albany and Susquehanna R. Co., et al.*, 156 Fed. 132, and in the Circuit Court of Appeals, 159 Fed. 1022.

By the lease made in 1870 the Albany and Susquehanna Rail Road Company demised its property in perpetuity to the defendant, The Delaware and Hudson Company, the lessee agreeing to pay a fixed rental, part of which was to be applied to interest on outstanding bonds, part to the payment of dividends directly to Susquehanna stockholders, and the balance of the rent, if any, to be paid to the Susquehanna Company. The payments to be made to stockholders, were, in addition to the covenants of the lease, further secured by undertakings entered into by the Delaware Company with each individual stockholder in the Susquehanna Company,—this guarantee being in every case endorsed upon the stock certificates.

The decree of the Circuit Court found the defendant Delaware Company in arrears in payment of rental to the amount, including interest, of $1,107,923.24. From this decree the Delaware Company appealed to the Circuit Court of Appeals where the case was heard and by which court, on May 22, 1908, two questions were certified to this Court for its decision.

Statement by Circuit Court of Appeals.

"The defendant corporations are both citizens of the State of New York; the complainants are citizens of the States of Connecticut and Rhode Island. The bill was brought to obtain an accounting for various sums of money, which it was alleged became due at intervals during a series of years from the Delaware Company to the Susquehanna Company as rental or in the nature of rental under a lease made in 1870. For the convenience of all" . . . "the pleadings" . . . "may be referred to for a more detailed statement of the cause of action. The bill does not "set forth with particularity the efforts of the plaintiffs to secure such

action as they desire on the part of the managing directors or trustees." Nor did the proofs show any such efforts. Nor does the bill set forth any efforts to secure "such action on the part of the shareholders." Nor did the proofs show any such efforts. Nor did the bill set forth, or the proofs show, "the causes of their failure to obtain such action" otherwise than is hereinafter disclosed.

"The complaint was filed on June 12, 1906. The Susquehanna Company was organized under the Act of April 2, 1850, which provides that 'there shall be a board of thirteen directors . . . to manage its affairs' and for many years before this suit was brought a majority of the Board of Directors of the Susquehanna Company consisted of persons who were officers, directors or employees of the Delaware Company. At the time this suit was instituted, the directors and officers of the Susquehanna Company, the dates of their election as such, and their relations to the Delaware Company with dates of election were as shown on the following statement:

Names of Directors of Susquehanna Company and dates of election as directors and officers.	Position in The Delaware and Hudson Company and dates.
Robert M. Olyphant, 1878	Director since 1872. President from 1884 to 1903. Chairman of the board since 1903.
George I. Wilber, 1883	Director since 1901.
David Willcox, 1894 (Vice-President, May 9, 1906)	General Counsel 1894 to 1903. Director since 1899. President since 1903.
R. Suydam Grant, 1901	Director since 1886.
Charles A. Peabody, 1902	Director since 1902.
William S. Opdyke, 1903	General Counsel since 1903. Director since 1905.

Names of Directors of Susquehanna Company and dates of election as directors and officers.	Position in The Delaware and Hudson Company and dates.
Abel I. Culver, 1903	A Vice-President since 1903.
Charles A. Walker, 1892	Treasurer 1892.
Robert Olyphant, 1887 (President since 1889)	Son of Robert M. Olyphant.
William L. M. Phelps, 1873 (Secretary since 1870)	Secretary of the Albany and Susquehanna Company, elected by the Board of Directors.
Robert C. Pruyn, 1890	Nominees of the Delaware Company as stated in the Delaware Company's answer.
James H. Manning, 1890	

"Of these Robert M. Olyphant, R. Suydam Grant, Charles A. Peabody, William S. Opdyke, Abel I. Culver and Robert C. Pruyn at the time this suit was begun did not own or hold in their own right any share of stock in the Susquehanna Company, but shares of stock of that company owned by the Delaware Company were transferred to each of them on the books of the Susquehanna Company by the Delaware Company for the purpose of qualifying them as such directors. Charles A. Walker owned five shares of Susquehanna stock from 1901 to 1906; it does not appear that he owned any stock in the Susquehanna Company during the year 1906.

"So far as appears from anything shown in this record none of the directors or officers of the Delaware Company ever, before or after the bringing of this suit, treated the claim therein set forth otherwise than as one of doubtful validity the payment of which was to be resisted.

"On June 12, 1906, and for thirty years prior thereto, the capital stock of the Susquehanna Company had been fixed at and limited to 35,000 shares. Of this capital stock

on June 12, 1906, the Delaware Company owned 4500 shares and its directors or officers owned or controlled 4340 shares; the complainants owned 1312 shares and a so-called Protective Committee who from and after December, 1905, had been opposing the administration of the Delaware Company upon the questions involved in this bill controlled 6688 shares. The entire 35,000 shares were held by 546 different persons, of whom 423 owned 50 shares or less, and of whom 383 resided in the State of New York.

"An annual meeting of the Susquehanna Company was held subsequent to the beginning of this suit, on October 16, 1906. At that meeting the nominees of the Protective Committee were elected, receiving 15,501 ballots, the nominees of the former management receiving 15,441 ballots. About two weeks before such annual meeting the Susquehanna Company being then controlled by the directorate above named, filed a demurrer to the bill" . . . "Copies of such demurrer were sent by stockholders opposed to the existing control to all stockholders and thereafter and before the meeting proxies for several thousand shares were received by the persons who voted for the nominees then elected."

Questions Certified.

"Upon the facts above set forth the questions of law concerning which this court desires the instruction of the Supreme Court are:

FIRST: Does the fact that before institution of this suit complainants made no demand for relief upon the Board of Directors of the Susquehanna Company prevent them from maintaining this bill?

SECOND: Does the fact that before institution of this suit complainants made no effort to obtain relief at a stockholders' meeting prevent them from maintaining this bill?"

To this Certificate the Circuit Court of Appeals attached the pleadings in the case "which may be referred to for a more detailed statement of the cause of action" (Rec. p. 1).

Complainants assert the right to maintain the present suit on two separate grounds—first as stockholders asserting the right of their corporation, and second as stockholders to whom by guarantee the Delaware Company assumed direct relations.

Determination of the questions asked by the Circuit Court of Appeals as to complainants' right to maintain this suit therefore requires consideration of complainants' relations to the transactions upon which they sue, first as stockholders in the Susquehanna Company, second as guaranteed stockholders,—stockholder-creditors,—of the Delaware Company.

The facts in regard to the first ground of jurisdiction were the subject of conflicting evidence and the findings of the court on this branch of the case are therefore stated in the certificate.

The facts in regard to the second ground of jurisdiction,—the lease, guarantee, etc.,—are fully stated in the bill and answer, and to these pleadings therefore the certificate refers,—certification of the pleadings being made advisable, when question arises under the 94th Equity Rule by the statement of this Court, that in these cases

"the court will examine the bill in its entirety and determine whether, under all the circumstances, the plaintiff has made such a showing of wrong on the part of the corporation or its officers and injury to himself as will justify the suit."

Corbus vs. Gold Mining Co., 187 U. S. 455, 463.

Immaterial statements of counsel for the Delaware Company, not justified by the Record, may be disregarded. Where they are material, the Record itself affords the correction. Some instances of material departures are as follows:

"It is undisputed that the Delaware Company did pay the fixed dividends and the annual interest and sinking fund requirements." (Brief for Delaware Company, p. 4.)

"The . . . incidental claim of the complaining stockholders, as individuals, upon a direct guaranty for a small portion of the entire sum in controversy . . ." was not allowed by the Circuit Court. (Brief for Delaware Company, pages 5 and 6.)

"There is not a pretense of any fraudulent conduct or concealment on the part of the directors of the Susquehanna Company." (Brief for Delaware Company, p. 24.)

Complaining stockholders "had slept upon their rights for many years." (Brief for Delaware Company, p. 31.)

The complainants' claim "was too recent in its invention to have ever been discussed or acted upon at any previous meeting of the shareholders." (Brief for Delaware Company, p. 31.)

BRIEF

I

Complainants are entitled under the facts stated by the Circuit Court of Appeals to sue as stockholders in the Susquehanna Company asserting rights due that Corporation.

A. COMPLAINANTS WERE NOT REQUIRED BEFORE INSTITUTING THIS SUIT TO DEMAND RELIEF FROM THE DIRECTORS OF THE SUSQUEHANNA COMPANY.

1. *The present case is not within the purpose of Equity Rule 94.*

The purpose of the rule is to prevent the maintenance of suits in Federal Courts by collusion between complainants and the defendant corporation whose rights they assert.

Hawes vs. Oakland, 104 U. S. 450;
Citizens Trust Co. vs. Illinois Central R. Co., 205 U. S. 46, 47;
Doctor vs. Harrington, 196 U. S. 579, 588;
Chicago vs. Mills, 204 U. S. 321;
Young vs. Mining Co., 71 Fed. 810;
Eldred vs. American &c. Co., 99 Fed. 168.

The Certificate shows that this suit is not collusive.

"It is true that 'this suit' was not the result of any collusion between the Susquehanna Company and the complaining stockholders." Argument for Delaware Company, p. 13.

2. The present case is not within the requirements of Equity Rule 94, as to demand upon directors. The bill shows under oath that directors were hostile, that demand upon them would be "idle and nugatory," that this is not a collusive suit, etc.

Equity will not permit double directors, by contracts made with themselves in other capacities, to bind shareholders or the corporation,

Wardell vs. Railroad Co., 103 U. S. 651;
Twin-Lick Oil Co. vs. Marbury, 91 U. S. 587.

A court will not entertain litigation in which both sides are controlled by one *dominus litis*.

South Spring Gold Co. vs. Amador Gold Co., 145 U. S. 300;
Mills vs. Green, 159 U. S. 651, 654;
East Tennessee &c. Co. vs. Telegraph Co., 125 U. S. 695.

"No decree entered under those circumstances should be permitted to stand."

Hatfield vs. King, 184 U. S. 162.

And parties who bring such litigation without disclosing the relationship of parties are guilty of punishable contempt of court.

Lord [illegible] Veazie, 8 How. 251;
Little [illegible] Bowers, 134 U. S. 547, 557;
Hatfield vs. King, 184 U. S. 162.

When directors are under adverse control stockholders may sue without demand for relief from a hostile Board.

Citizens Trust Co. vs. Illinois Central R., 205 U. S. 46.

> This was a stockholders' suit brought by the Trust Company without demand, alleging that directors were hostile and that demand "would have been vain and futile." This Court stated that the suit was "properly brought." 205 U. S., p. 47.

Doctor vs. Harrington, 196 U. S. 579;
Corbus vs. Gold Mining Co., 187 U. S. 455;
Heath vs. Erie Railway Co., 8 Blatch. 347, 409;
Bill vs. Telegraph Co., 16 Fed. 14, 19;
Columbia Dredging Co. vs. Washed Bar Sand Dredging Co., 136 Fed. 710;
Bigelow vs. Calumet & Hecla Mining Co., 155 Fed. 869;
Dickinson vs. Traction Co., 114 Fed. 232;
Eldred vs. American etc. Co., 99 Fed. 168;
Berwind vs. Canadian Pac. Ry. Co., 98 Fed. 158.
Ball vs. Rutland R. Co., 93 Fed. 513;
Weir vs. Bay State Gas Co., 91 Fed. 940;
Rogers vs. Nashville &c. Ry Co., 91 Fed. 299;
De Neufville vs. Railroad Co., 81 Fed. 10.

B. COMPLAINANTS WERE NOT REQUIRED BEFORE INSTITUTING THIS SUIT TO DEMAND RELIEF AT A MEETING OF SUSQUEHANNA STOCKHOLDERS.

Hawes vs. Oakland does not state when demand upon stockholders is necessary and when it is not, but

for a statement of "the general doctrine and its limitations" refers to *Brewer vs. Boston Theatre,* 104 Mass. 378. That case announces the rule (p. 387), that "where the stockholders retain no control of the corporate business, except by means of an annual election of officers, those officers, during their term of service, represent the corporation for all purposes" and a demand upon stockholders before bringing suit is not necessary.

Demand on stockholders was not necessary in this case because:

1. *Under Susquehanna charter stockholders could not grant relief.*

Laws of New York, 1850, Chap. 140;

"In all litigation involving the action of the corporation they (the directors) are its representatives in court." Stockholders cannot control or interfere with their management. *Railway Co. vs. Alling,* 99 U. S. 463, 472.

Pullman Co. vs. Missouri Pacific R. Co., 115 U. S. 587;
Beveridge vs. New York &c. R. Co., 112 N. Y. 1, 21, 23;
Robinson vs. Smith, 3 Paige Ch. 222;
McCullough vs. Moss, 5 Denio 567;
Conro vs. Port Henry Iron Co., 12 Barb. 27;
Morawetz on Corporations, 2d ed., Secs. 283, 510;
Cook on Corporations, 5th ed., Secs. 684, 750, and other cases.

Even if stockholders could by resolution require directors to institute litigation against the Delaware Company, they could not oust directors from office, before expiration of their terms.

Laws of New York, Act of 1850, Chap. 140, Sec. 5.

And no court would entertain a suit against the Delaware Company conducted by the Delaware administration of the Susquehanna Company.

South Spring Gold Co. vs. Amedor Gold Co., 145 U. S. 300;
Mills vs. Green, 159 U. S. 651;
East Tennesse &c. Co. vs. Telegraph Co., 125 U. S. 695.

2. *Suits are regularly maintained in Federal courts without demand upon stockholders for a resolution directing litigation.*

Ex parte Young, 209 U. S. 123;
Cotting vs. Kansas City Stock Yards Co., 183 U. S. 79;
Dinsmore vs. Southern Express Co., 183 U. S. 115;
Smyth vs. Ames, 169 U. S. 466;
Pollock vs. Farmers &c. Trust Co., 157 U. S. 429;
Greenwood vs. Freight Co., 105 U. S. 13;
Schultz vs. Highland Gold Mines Co., 158 Fed. 337;
Perkins vs. Northern Pacific Co., 155 Fed. 445;
Monmouth Investing Co. vs. Means, 151 Fed. 159;
Weir vs. Bay State Gas Co., 91 Fed. 940;
Ball vs. Rutland Railroad Co., 93 Fed. 513;
Dinsmore vs. Southern Express Co., 92 Fed. 714.

3. *No case was ever dismissed from a Federal court for want of an application to stockholders for a resolution directing litigation on behalf of the corporation.*

4. *The facts of this case show neither (a) anything which could be submitted to stockholders for ratification; nor (b) anything stockholders could ratify.*

(*a*) There was nothing to submit to stockholders.

When a stockholders' vote makes a voidable act valid or void, it acts upon something which directors have done. In this case directors have done nothing and stockholders cannot control their course.

(*b*) Stockholders can not, by anything short of a unanimous vote, authorize or ratify gifts of corporate property.

Brewer vs. Boston Theatre, 104 Mass. 378;
Jackson vs. Ludeling, 21 Wall. 616;
Ervin vs. Oregon R. & N. Co., 27 Fed. 625, 631;
Mumford vs. Ecuador Development Co., 111 Fed. 639;
Menier vs. Telegraph Works, L. R. 9 Ch. App. 350;
Gamble vs. Queens County Water Co., 123 N. Y. 91;
Farmers &c. Trust Co. vs. New York &c R. Co., 150 N. Y. 410.

5. *Complainants desiring institution of a law-suit were not required by Rule 94 to ask for election of a new board of directors.*

6. *When this suit was instituted the Delaware Company controlled the Susquehanna stock vote.*

7. *Stockholders whose corporation is in adverse control are entitled to protection by injunction.*

II

Complainants are entitled to maintain this Bill by reason of their direct relations to both defendant Corporations. Rule 94 does not apply to this case.

The Delaware Company has not only agreed with the lessor corporation by covenant in the lease to pay rent for the Susquehanna property, but by the guarantee on stock certificates has also agreed with individual stockholders that payment of this rent shall be made by dividing the corporate income as provided in the lease.

A. THE DELAWARE COMPANY HAS, THEREFORE, IN RESPECT TO CORPORATE RIGHTS OF THE SUSQUEHANNA COMPANY, ENTERED INTO PRIVITY OF CONTRACT WITH EVERY SUSQUEHANNA STOCKHOLDER, CONCERNING DIVISION OF THE ENTIRE RENT.

Hawes vs. Oakland, 104 U. S. 450.

B. STOCKHOLDERS' SUITS CANNOT BE AT LAW, FOR THE GUARANTEES ARE PART OF THE ENTIRE COVENANT TO PAY THE ENTIRE RENT ARISING FROM A SINGLE DEMISE OF CORPORATE PROPERTY.

C. AN ACTION TO DIVIDE CORPORATE INCOME AMONG STOCKHOLDERS MUST BE BROUGHT IN EQUITY, —OTHERWISE THE LESSEES' RIGHT OF OFF-SET WOULD BE DEFEATED AND UNEQUAL DIVISION OF INCOME MADE AMONG STOCKHOLDERS.

Barr vs. New York &c. Co., 96 N. Y. 444.

THE NEW YORK ACT OF 1850

In accordance with Rule 21 of this Court the relevant portions of the New York statute under which the Albany and Susquehanna Rail Road Company was incorporated are printed at length. This statute is the Act of April 2, 1850.

Section 5. There shall be a board of thirteen directors of every corporation formed under this Act, to manage its affairs. Said directors shall be chosen annually, by a majority of the votes of the stockholders voting at such election, in such manner as may be prescribed in the by-laws of the corporation, and they may and shall continue to be directors until others are elected in their places. . . .

ARGUMENT

I

Complainants are entitled under the facts stated by the Circuit Court of Appeals to sue as stockholders in the Susquehanna Corporation asserting rights due to that Corporation.

The certificate of the Circuit Court of Appeals shows that when this suit was begun the Susquehanna Company was controlled by "the administration of the Delaware Company" (Rec. p. 3), that this administration was hostile to complainants and to the assertion of the claim advanced in this case on behalf of the Susquehanna Company, and that the case at bar is not a collusive action. Complainants could not safely leave to this hostile Board of Directors the assertion of their rights, but so far as possible they complied with Rule 94, by showing the adverse control of their corporation, and by the allegation, under oath, that "no demand for "action in the premises has been made of the directors "of the Susquehanna Company, for the reason that "such demand, under the facts and circumstances set "forth, would be idle and nugatory, and that this suit "is not a collusive one to confer jurisdiction upon the "Circuit Court of the United States in respect to a "matter of which it would not otherwise have cog- "nizance." Bill of Complaint, Rec. p. 21–22.

During the progress of this litigation and as one of the developments in this case, the Delaware Company has lost control of the Susquehanna corporation. Complainants' right to maintain this bill remains, however, for

"the question of jurisdiction must be decided, having reference to the attitude of the case at the date the bill was filed."

Chicago vs. Mills, 204 U. S. 321, 328.

It is true that complainants' success works to the pecuniary advantage of the Susquehanna Company, but this does not align the Susquehanna corporation on the same side of the case with the complainants. When the bill was filed the Susquehanna Company and the Delaware Company united in opposing the claim of Susquehanna stockholders. Both corporations demurred to complainants' bill on the merits, and specifically also, asserted want of compliance with Rule 94. Both corporations then, when the suit was begun, were adverse to complainants.

"Both defendants unite, as sufficiently appears by the petition and other proceedings, in resisting the plaintiff's claim of illegality and fraud. They are alleged to have engaged in the same illegal and fraudulent conduct, and the injury is alleged to have been accomplished by their joint action. The plaintiff's controversy is with both, and both are rightfully and necessarily made defendants, and neither can, for jurisdictional purposes, be regarded otherwise than as a defendant."

Venner vs. Great Northern Ry., 209 U. S. 24, 32 and cases cited.

The question presented, therefore, by the certificate of the Circuit Court of Appeals is this:

Whether stockholders who have been injured through adverse control of their corporation must before beginning suit offer to opposing interests an opportunity to complete the wrong and injury which should be redressed. Must stockholders before beginning suit offer in good faith to put their case into the hands of their adversaries?

A. COMPLAINANTS WERE NOT REQUIRED BEFORE INSTITUTING THIS SUIT TO DEMAND RELIEF FROM THE DIRECTORS OF THE SUSQUEHANNA CORPORATION.

1. *The present case is not within the purpose of Equity Rule 94.*

The Rule this Court has said "simply expresses the principles which this Court, after a review of the authorities, had declared in *Hawes vs. Oakland,* 104 U. S. 450, to be applicable in the decision of a stockholder's suit . . ."

Venner vs. Railway Co., 209 U. S. 24, 33–34.

When a question arises then, as to the application of the Rule to the facts in any particular suit, it becomes necessary to refer to the opinion in *Hawes vs. Oakland.* The evil to be remedied the Court there said, was the increasing practice of instituting in federal courts, actions of a collusive nature, brought in the name of the stockholders, but in fact for the benefit of, and by an understanding with, the corporation itself. In such cases, the stockholder's name was a screen for the perpetration of a fraud upon the federal jurisdiction. The Court said:

"Since the decision of this court in *Dodge vs. Woolsey* (18 How. 331), the principles of which have received more than once the approval of this court, the frequency with which the most ordinary and usual chancery remedies are sought in the Federal courts by a single stockholder of a corporation who possesses the requisite citizenship, in cases where the corporation whose rights are to be enforced cannot sue in those courts, seems to justify a consideration of the grounds on which that case was decided, and of the just limitations of the exercise of those principles.

"This practice has grown until the corporations created by the laws of the States bring a large part of their controversies with their neighbors and fellow-citizens into the courts of the United States for adjudication, instead of resorting to the State courts, which are their natural, their lawful, and their appropriate forum.

"It is not difficult to see how this has come to pass. A corporation having such a controversy, which it is foreseen must end in litigation, and preferring for any reason whatever that this litigation shall take place in a Federal court, in which it can neither sue its real antagonist nor be sued by it, has recourse to a holder of one of its shares, who is a citizen of another State. This stockholder is called into consultation, and is told that his corporation has rights which the directors refuse to enforce or to protect. He instantly demands of them to do their duty in this regard, which of course they fail or refuse to do, and thereupon he discovers that he has two causes of action entitling him to equitable relief in a court of chancery; namely, one against his own company, of which he is a corporator, for refusing to do what he has requested them to do; and the other against the party which contests the matter in controversy with that corporation. These two causes of action he combines in an equity suit in the Circuit Court of the United States, because he is a citizen of a different State, though the real parties to the controversy could have no standing in that court."

Hawes vs. Oakland, 104 U. S. 450, 452–453.

Resort to federal courts upon such allegations was in fact a fraud upon Federal jurisdiction.

Dodge vs. Woolsey was decided in 1855. The fraudulent practice of which the Court spoke in *Hawes vs. Oakland* did not develop at once thereafter, but in 1875 it must have been widespread, for by the Act of March 3d, Chap. 137, Sec. 5, in that year, Congress provided that if at any time in the progress of a case begun in or removed to a United States Circuit Court, it shall appear

"that such suit does not really and substantially involve a dispute or controversy properly within the jurisdiction of said circuit court, or that the parties to said suit have been improperly or collusively made or joined, either as plaintiffs or defendants, for the purpose of creating a case cognizable or removable under this act, the said circuit court shall proceed no further therein, but shall dismiss the suit or remand it to the court from which it was removed."

Following this Statute the Court in 1882 adopted Rule 94. It has been said that, so far as the Statute is concerned, the power of the court to dismiss a case which "does not really and substantially involve a dispute or controversy properly within the jurisdiction of said Circuit Court" is

"limited to disputes or controversies not within the jurisdiction of the circuit court by reason of the requisite citizenship not really existing, or being collusively obtained, as in *Hawes vs. Oakland*, 104 U. S. 450, or where, upon an examination of the record, the requisite amount is found not to have been involved, as in *Walter vs. Northeastern Railroad*, 147 U. S. 370."

Cates vs. Allen, 149 U. S. 451, 464–5.

The foregoing quotation from the dissenting opinion of Justices Brown and Jackson represents an extreme view, for the Statute is broader than the Rule and directs dismissal not only of cases in which parties have been collusively joined to create federal jurisdiction but requires dismissal of any case which "does not . . . substantially involve a . . . controversy properly within the jurisdiction of said circuit court." Under this provision the majority of the Court in the case cited held that the distinction between law and equity observed in federal courts could not be removed by State legislation and that inasmuch as complainants in the bill then under consideration had failed to make a case within the general principles of equity jurisdiction, the case could not be removed from a State to a federal court.

With such cases and with the breadth of the Statute, we are not concerned. The Rule deals with stockholders' suits exclusively, and in substance provides that a stockholder cannot sue upon a corporate right when the corporation is able and willing to protect its own rights. When a case is dismissed under the Rule, therefore, because in the words of the Statute "the parties to said suit have been improperly or collusively joined . . . for the purpose of creating a case cognizable" in a federal court, the ground of the order of dismissal is always "for want of equity" because complainant has shown "no right in himself to prosecute this suit." This was the order in *Hawes vs. Oakland*, 104 U. S. 450, 462; in *Venner vs. Railway Co.*, 209 U. S. 24 and in other cases dismissed under the Rule.

Where the parties are collusively joined within the

prohibition of the Statute, but not being stockholders' actions are not within the Rule, the order is different. Such suits are dismissed for the want of federal jurisdiction, not for want of equity.

Hayden vs. Manning, 106 U. S. 586;
Farmington vs. Pillsbury, 114 U. S. 138;
Dawson vs. Columbia Trust Co., 197 U. S. 178.

The matter, in other words, being capable of consideration from either of two points of view—in its relation to federal jurisdiction, or in its relation to complainants' capacity to sue—the operation of the Rule has been directed to the cause of action itself. A stockholder cannot sue, when the corporation is able and willing to assert its own rights, and though under the Statute the court might in these cases "look beyond the pleadings and arrange the parties according to their sides in the dispute," and this being done, dismiss the bill for want of jurisdiction,

Dawson vs. Columbia Trust Co., 197 U. S. 178, 180,
Kimball vs. City of Cedar Rapids, 99 Fed. 130, 132,

a case within the Rule being also within the Statute,

Detroit vs. Dean, 106 U. S. 537, 539,

nevertheless, proceeding under the Rule in stockholders' suits this is not done. The case in stockholders' suits is taken as the bill made it; the parties are not re-arranged; diversity of citizenship exists and therefore jurisdiction exists, but the complainants' right to sue does not exist; so far as appears the corporation is not only willing and able to maintain its rights, but in

most cases falling within the Rule, actually seeks to do so by means of the suit in the stockholders' name. The cause of action then is fictitious and the Rule, which seizes upon collusion or fiction, compels the dismissal of the bill, upon grounds which relate to this collusion or fiction.

Illinois Central Railroad Co. vs. Adams, 180 U. S. 28, 34–35.

In some aspects Rule 94 has an evident bearing on Federal jurisdiction.

On application for an order for substituted service where the Rule is not complied with and complainant seeks to bring in the corporation as a defendant

"the failure to comply with equity rule 94 not only affects the merits, but determines the proper alignment of the parties, and thus indirectly goes to the question of federal jurisdiction."

Gage vs. Riverside Trust Company, 156 Fed. 1002, at p. 1007.

In this case an order for substituted service was vacated, and unless complainants took leave to amend, the bill was to be dismissed for want of jurisdiction. The court said:

"no matter how the parties be aligned, failure to comply with equity rule 94 goes only to the merits, and it can affect the question of federal jurisdiction only when a jurisdictional arrangement is required." (p. 1008.)

The same aspect of Rule 94 appears also in cases brought to this Court under the first paragraph of Section 5, Act of March 3, 1891. The statute enacts that

in these cases "the question of jurisdiction alone shall be certified to the Supreme Court from the court below for decision." Under this provision, this Court will, when necessary, determine whether a complainant in the court below has sufficiently complied with the Rule, to be able to maintain a stockholder's suit.

Doctor vs. Harrington, 196 U. S. 579.
Chicago vs. Mills, 204 U. S. 321.

The distinction which the Court has taken, emphasizes the fact that the purpose of the Rule is to prevent collusive and fictitious suits, instituted in the name of non-resident stockholders, but by and for the benefit of the corporation. Such collusive suits are dismissed, whether demand has been made upon directors or not. As the Court remarked in a recent case, speaking of *Memphis vs. Dean,* 8 Wall. 64,

"This court ordered the bill dismissed, not because Dean and the corporation had identical interests, but because the refusal of the directors of the corporation to sue was collusive."

Doctor vs. Harrington, 196 U. S. 579, 588.

Existence of collusion between complainants and the corporation whose stock they hold, or the assertion of a fictitious cause of action upon the pretence that the corporation is opposed to its stockholders, is the test in every case which has been decided under the 94th Rule, —necessarily the test for the question before the court in every case is whether the suit as framed is real or fictitious.

The purpose and the effect of the ninety-fourth rule was to prevent collusion (p. 811). "But, where the

bill, in all of its averments, shows that the controversy is substantially between citizens of different states, and that there is no collusion, all of the ends of the rule are already met. To require more would be to exalt the means above the end."

Young vs. Mining Co., 71 Fed. 810, 811–12.
Eldred vs. American &c. Co., 99 Fed. 168.

This appears in almost every decision on the subject, and many expressions may be found, such as that in a recent case when the Court applying this Rule said:

"Upon the whole record we agree with the Circuit Court that the testimony does not disclose that the jurisdiction of the Federal court was collusively and fraudulently invoked, and the judgment below will be affirmed."

Chicago vs. Mills, 204 U. S. 321, 331.

In the present case, if the Susquehanna Company, desiring to sue the Delaware Company, had by arrangement with complainants caused the present suit to be instituted in the federal court the proceeding would have been collusive, under the Statute and the Rule, and the case would have been dismissed.

In fact the case at bar shows a situation the direct reverse of this. The Delaware Company and the Susquehanna Company were under an identical management,—a management which the Certificate of the Circuit Court of Appeals describes, in relation to the Susquehanna Company, as "the administration of the Delaware Company" (Rec. p. 3). The Certificate further states that "so far as appears from anything shown in this record none of the directors or officers of the Delaware Company ever, before or after the bringing of this suit, treated the claim therein set forth

otherwise than as one of doubtful validity the payment of which was to be resisted" (Rec. p. 2).

There is no collusion, on the part of complainants, then, in the present case. On the other hand, the two defendant corporations being under one single management were,—if an identical management can be said to collude with itself,—acting in collusion for the benefit of the Delaware Company. Both were hostile to complainants, and when the suit was instituted both united in resisting the bill. Neither is there a fictitious cause of action, for the Susquehanna Company was as much opposed to complainants as was the Delaware Company itself. Under these circumstances, then, as the Court recently said, "The plaintiff's controversy is with both" (*Venner vs. Railway,* 209 U. S. 24, 32).

Complainants' bill, therefore, brought into court a real controversy. In this case,—as in *Doctor vs. Harrington,* 196 U. S. 579—the complainants' corporation was in hostile control and in the one case as in the other,

"it is manifest that if the matter alleged be true, complainants will suffer irremediable loss if not permitted to sue, and as they had a cause of action they rightly brought it in the Circuit Court of the United States."

Doctor vs. Harrington, 196 U. S. 579, 588–9.

So, too, in *Citizens Trust Co. vs. Illinois Central R. Co.,* 205 U. S. 46, a stockholder's suit where no demand had been made upon directors because under hostile control, this Court said (p. 47):

"Assuming the allegations of the bill to be true, the suit is not a collusive one, and could be properly brought by a stockholder . . ."

2. The present case is not within the requirements of Equity Rule 94 as to demand upon directors.

The Rule in purpose and substance provides that stockholders may not assert a right owing to the corporation when the corporation is able and willing itself to assert the right. To prevent such collusive suits by stockholders, the Rule requires stockholders, before coming into court, to apply in good faith to the corporation for relief. Only when this has been done, and the corporation has in good faith refused to act, can stockholders take its place and assert its rights. The demand for relief, then, must be made upon the corporate authority having power to grant relief.

A demand upon the directors for relief which the stockholders only can grant, or a demand upon the stockholders for relief which the directors only can grant, would be no demand at all and would not satisfy the provisions of the Equity Rule.

In the present case the relief desired was to be obtained only by a litigation instituted and prosecuted in good faith against the Delaware Company, solely in the interest of the Susquehanna Company.

The institution and prosecution of a litigation is a matter wholly within the power of the Board of Directors of the corporation,—a matter with which stockholders have nothing to do. The question, then, which arises in the present case, concerning the meaning and construction of Equity Rule 94 is, whether the Board of Directors constituted as stated in the Certificate of the Circuit Court of Appeals was able and willing to grant the relief to which complainants were and are entitled.

Complainants insist that they are not required to

leave the redress of grievances with the parties of whom they complain. If the persons to be sued control the corporation which should sue, that corporation is not "able and willing" to compel redress. "No man," Mr. Madison said, "is allowed to be a judge in his own cause, because his interest would certainly bias his judgment, and, not improbably, corrupt his integrity" (Federalist No. X).

Counsel for the Delaware Company assert that although the Boards of Directors of the two corporations may have been composed of the same persons, nevertheless the two capacities may be kept distinct. One sufficient answer to this argument is that the two capacities were not kept distinct. Control of the Susquehanna corporation by officers and representatives of the Delaware Company is described by the Circuit Court of Appeals as *"the administration of the Delaware Company"* (Certificate, Rec. p. 3). Counsel for appellant ignore this fact. They insist that it was the duty of stockholders to leave the litigation between the two corporations in the hands of the gentlemen who directed the affairs of the Delaware Company.

If this duty exist, the merits of the controversy are unimportant. The right to legal and equitable remedies against the Delaware Company is of value only upon the condition that it be vested in some person other than the Delaware Company itself.

The reference to the pleadings for a more detailed statement of the cause of action shows that for over a year before this suit was begun, the Susquehanna directors acting with and for the Delaware Company, had sought by misrepresentation and suppression of important facts in their official communications to Susquehanna stockholders, to procure from those

stockholders authority for a stock issue which would have protected the Delaware Company from the liability now in suit. (Bill of Complaint, folios 23–27.) The answer of the Delaware Company admits the facts upon which the charges are based. (Answer folios 110–111.)

The Delaware Company asserts, by its answer in this case, that it has fully performed its obligations to the Susquehanna Company, and that it has not "at any time failed to pay any amount by way of rental, which it was bound to pay" (Rec. p. 69). Both the Delaware Company (Rec. p. 45) and the Susquehanna Company (Rec. p. 81)—then under "the administration of the Delaware Company,"—demurred to complainants' bill on the merits. The answer of the Delaware Company, denying all liability, was verified under oath by Charles A. Walker, a director of the Susquehanna Company. The Delaware demurrer was supported by the oath of David Willcox, another Susquehanna director and Vice-President of the Susquehanna Company, and both answer and demurrer bore the signature of William S. Opdyke, a third Susquehanna director, while Robert Olyphant, a fourth director and President of the Susquehanna Company, signed the Susquehanna demurrer.

The bill of complaint alleges that a demand for relief upon these men and their associates would have been "idle and nugatory" (Rec. pp. 21–22). Here we have the answer to this allegation, in which Susquehanna directors acting for the corporation acquit the Delaware Company of all indebtedness.

As an act of reciprocity the Delaware Company, over its corporate signature, certifies to the complete integrity of those who thus receipt to it in full. All

the Susquehanna directors, the Delaware Company asserts,

"while acting as directors of the Susquehanna Company, always fully performed their duties to the Susquehanna Company and its stockholders, never believing that their relations to this defendant required them to act unjustly toward the Susquehanna Company." (Answer, Rec. p. 73.)

After this assurance of the Delaware Company, that Susquehanna directors had "always fully performed their duties to the Susquehanna Company" and from Susquehanna directors that the Delaware Company had always fully paid its debts and owed nothing, it might be expected that the Susquehanna Board would frankly state that it would not sue for money which, it asserted, was not owing.

No such course is followed. The Delaware Company,—fully informed as to what Susquehanna directors would or would not have done,—alleges upon information and belief, that if demand had been made by complainants upon the Susquehanna Company before beginning this suit, "such action would have been taken by the said company in that behalf as should have been advised by disinterested counsel learned in the law and in no way connected with this defendant to be proper and expedient" (Rec. p. 75).

Defendant admits, then, that complainants are entitled at least to "disinterested" representation, and that in litigation with the Delaware Company—whatever might be the connection of Susquehanna directors—the Susquehanna counsel should not be "connected with this defendant." Susquehanna directors were personally charged with misdoing,—still, so the answer states,—this disinterested representation would have

been provided for the Susquehanna Company, had we been willing only to trust these directors a little further.

Would this selection of counsel and these assurances have met and satisfied complainants' right to substantial and bona fide relief? Better, far, the course of continued neglect so long followed, than that Susquehanna rights should be litigated, and become *res adjudicata*, in a suit conducted by counsel chosen and directed, by Delaware representatives, whose conduct furnishes the subject matter of litigation.

"These men, while holding a trust relation for each company, were assuming at the same moment to act both for the lessee and the lessor. This double action on their part was inconsistent with their legal duty to each company. In plain language, it was a clear breach of trust, and their action was capable of being impeached in a court of equity, on the part of any stockholder who felt himself aggrieved."

Marie vs. Garrison, 13 Abb. N. C., 210, 229.

"It is among the rudiments of the law that the same person cannot act for himself and at the same time, with respect to the same matter, as the agent of another whose interests are conflicting. Thus a person cannot be a purchaser of property and at the same time the agent of the vendor. The two positions impose different obligations, and their union would at once raise a conflict between interest and duty; and 'constituted as humanity is, in the majority of cases duty would be over-borne in the struggle' (*Marsh vs. Whitmore*, 21 Wall, 178, 183). The law, therefore, will always condemn the transactions of a party on his own behalf when, in respect to the matter concerned, he is the agent of others, and will relieve against them whenever their enforcement is seasonably resisted. Directors of corporations, and all persons who stand in a fiduciary relation

to other parties, and are clothed with power to act for them, are subject to this rule; they are not permitted to occupy a position which will conflict with the interest of parties they represent and are bound to protect."

Wardell vs. Railroad Co., 103 U. S. 651, 658;
Twin-Lick Oil Co., vs. Marbury, 91 U. S. 587, 588.

If then a court of chancery will not permit these double directors and officers to bind complainants by any contract which they may make with themselves in other capacities, will the court compel complainants to leave to these directors control of the litigation brought to review their dealings?

Upon this question the position of the Supreme Court is emphatic. A litigation between two corporations under the same control will not be heard in this Court, and a judgment rendered by the court below will be reversed so that stockholders may protect their own rights.

South Spring Co. vs. Amador Co., 145 U. S. 300.

To bring such a litigation "is an abuse which courts of justice have always reprehended, and treated as a punishable contempt of court."

Lord vs. Veazie, 8 How. 251, 255;
Little vs. Bowers, 134 U. S. 547, 557.

"And no decree entered under those circumstances should be permitted to stand."

Hatfield vs. King, 184 U. S. 162, 166.

On the other hand, when the corporation is in adverse control a long line of cases support stockholders' suits. The latest decision is *Citizens' Trust Co.*

vs. Illinois Central R. Co., 205 U. S. 46, 47, a suit brought by a stockholder in the Belleville Company against that Company and the Illinois Central Railway to assert rights owing to the Company by the Railway. The bill alleged that the directors of the Belleville Company were elected by and were under the control of the Railway—

"That a demand upon the directors or officers of the corporation itself, to bring the present suit would have been vain and futile, for the many reasons heretofore set forth in this bill of complaint. That the present suit is not collusively brought for the purpose of giving this Court jurisdiction."

Record of case, p. 19, paragraph XVIII.

The situation, then, was almost precisely the situation at bar. Upon this subject, Mr. Justice Harlan in his statement of the case said (page 47):

"Assuming the allegations of the bill to be true, the suit is not a collusive one, and could be properly brought by a stockholder of the Belleville Company, making that company a defendant."

This is in line with *Doctor vs. Harrington*, 196 U. S. 579 where the subject of demand upon hostile directors had previously been considered at some length, and where this Court had held such demand unnecessary. In *Doctor vs. Harrington* the complainants, stockholders in the Sol Sayles Company, filed their bill against their corporation, John J. Harrington and others, to compel Harrington and other defendants to surrender to the company assets which they had diverted to themselves. No demand had been made upon the directors of the corporation that action be taken in

the corporate name, but the bill alleged as sufficient reason for not making this demand that complainants were unable to secure corporate action, the Board being under "the absolute control and domination of the defendant John J. Harrington," who had "declined to redress the wrongs of which complaint is herein made, or to give the complainants any opportunity to lay before the Board of Directors . . . the facts herein set forth."

It was alleged that Harrington, like the Delaware Company in the case at bar, "directed the management of the affairs of the corporation" in which he was a stockholder, "dictated its policy, and selected its directors,"—but Harrington was not, so far as appears from the report of the case, either an officer or a director of the Sol Sayles Company.

The meaning of the charge that Harrington had refused "to give to the complainants any opportunity to lay before the Board of Directors . . . the facts herein set forth," does not appear. There is no corporate duty on the part of officers, directors or approving stockholders "to give opportunities" to stockholders who consider themselves aggrieved. The allegation is by no means equivalent to a statement that Harrington could or did prevent Doctor and the other complainants from making to the directors and officers of the Sol Sayles Company any communication, which complainants might see fit to make. There is no attempt in the bill to assert that the act of making demand was impossible, dangerous, or even in any way difficult. It is obvious, however, that if Harrington directed the management of the affairs of the corporation, dictated its policy and selected its directors, communications to that Board of Directors requesting corporate

action against Harrington would afford complainants no relief. The suit was not a collusive suit and this Court held that it was well brought in the United States Court.

The question then in every case is the question of collusion. Are the complainant stockholders and the defendant corporation in fact on opposite sides or are they acting together? The demand and refusal mentioned in the 94th Rule are significant only on this question. *Dodge vs. Woolsey*, 18 How., 331, held that refusal of the directors to sue caused the demandant stockholders and the corporation to

"occupy antagonistic grounds in respect to the controversy." (p. 295.)

But the means by which antagonism is reached are unimportant. The question is whether complainants are in fact as well as in form opposed to the defendants. If so, and if the parties on the two sides of the case are citizens of different States, federal jurisdiction exists in fact as well as in form.

Hawes vs. Oakland, 104 U. S. 450, modified the rule of *Dodge vs. Woolsey* by emphasizing the fact that where antagonism is shown only by the refusal of directors to sue to protect corporate rights, the refusal "must be real, not feigned."

Doctor vs. Harrington, 196 U. S. 579, 588.

Where the antagonism between the corporation and the complaining stockholder is nominal and not real, the most technical compliance with every form required by the Rule will not save the suit,

Hendrickson vs. Bradley, 85 Fed. 508. Certiorari denied, 171 U. S. 686.

while on the other hand, where the antagonism is genuine, complainants will not be required to put their rights into keeping of their adversaries. This is the whole extent of the Rule. A stockholder cannot sue on behalf of the corporation when the corporation is able and willing, in good faith, to assert its own rights. On the other hand, the Rule does not require stockholders to turn over protection of their rights to those who oppose them and profit by their defeat. The Rule is capable of reasonable construction. When collusion is suggested, the court will take into account the matters to which the Rule calls attention among other indicia of collusion.

"Under those circumstances a court of equity should scrutinize with the utmost care the conduct of the plaintiff and see that he has done everything which ought to have been done to secure action by the corporation and its directors," etc.

Corbus vs. Gold Mining Co., 187 U. S. 455, 465.

But the Supreme Court has refused to lay down any definite rule applicable to all cases.

"This court will examine the bill in its entirety and determine whether, under all the circumstances, the plaintiff had made such a showing of wrong on the part of the corporation or its officers and injury to himself as will justify the suit."

Corbus vs. Gold Mining Co., 187 U. S. 455, 463.

There has been no suggestion that, to prevent collusion on the part of complainants, the Rule will be so construed as to foster collusion between defendants.

In the lower federal courts and in State courts the

subject has often been considered and decisions with few exceptions are harmonious.

"It is sufficiently clear, in view of the action of the directors here, and their present attitude in affirming the validity and expediency of the lease, that any effort to induce them to take action in behalf of the corporation to annul it would be futile. The ceremony of an application to them on behalf of the complainant would be farcical. It may, therefore, be dispensed with, and the allegations of the bill in this behalf are probably in substantial compliance with Rule 94."

Bill vs. Western Union Tel. Co., 16 Fed. 14, 18.

When the corporation is controlled by a hostile board of directors

"it would be mockery to require or permit a suit against them to be brought and prosecuted under their management."

Blatchford J. in *Heath vs. Erie Railway Co.*, 8 Blatch. 347, 409.

To a Board of Directors or a body of stockholders thus constituted and influenced a formal demand for remedial action in the corporate name against the wrongdoer would be mere idle ceremony not required by law.

Columbia Dredging Co. vs. Washed Bar Sand Dredging Co., 136 Fed 710;
Bigelow vs. Calumet & Hecla Mining Co., 155 Fed. 869;
Eldred vs. American Car Co., 99 Fed. 168;
Berwind vs. Canadian Pacific Ry. Co., 98 Fed. 158;

Ball vs. Rutland R. R. Co., 93 Fed. 513;
Weir vs. Bay State Gas Co., 91 Fed. 940;
Rogers vs. Nashville &c. Ry. Co., 91 Fed. 299;
De Neufville vs. Railroad Co., 81 Fed. 10;
Aitken vs. Colorado R. &c. Co., 72 Fed. 591.

"If it is apparent in a case like the present, that the directors, who are alleged to have offended, are still in control of the corporation, and so implicated in the alleged wrongdoing as to make it certain that a demand upon them to right such wrong or to bring suit for that purpose would be an idle ceremony, it would be unreasonable to require such demand to be made."

Dickinson vs. Consolidated Traction Co., 114 Fed. 232, 241.

"To require complainants to show that they had exhausted all effort in inducing the directors to convict themselves of fraud, is absurd."

Excelsior Co. vs. Brown, 74 Fed. 321, 323.

"It would be unreasonable to expect the directors to institute a proceeding against themselves, and, should they do such a thing, the bad faith of their action would be so apparent that no court would entertain the suit."

Hingston vs. Montgomery, 121 Mo. App. 451; 97 S. W. 202, 204.

A stockholder may sue without demand where the persons who committed the wrongful acts continue to be directors of the corporation or where the corporation is in adverse control.

Hanna vs. Lyon, 179 N. Y. 107;
Green vs. Hedenberg, 159 Ill. 489;

Smith vs. Dorn, 96 Cal. 73;
Pittsburgh &c. Ry. Co. vs. Dodd, 115 Ky. 176;
O'Connor vs. Virginia &c. Power Co., 184 N. Y. 46;
Von Arnim vs. Am. Tube Works, 188 Mass. 515;
Wineburgh vs. U. S. &c. Advertising Co., 173 Mass. 60;
Morawetz on Corporations, 2d ed., Sec. 242.

It would be wholly contrary to established principles of justice to permit the authors of a wrong to conduct a litigation against themselves as agents of the injured complainant.

Crumlish vs. Railroad Co., 28 West Va. 623.

B. COMPLAINANTS WERE NOT REQUIRED BEFORE INSTITUTING THIS SUIT TO MAKE DEMAND FOR RELIEF AT A MEETING OF STOCKHOLDERS OF THE SUSQUEHANNA CORPORATION.

So far as concerns this subject the requirement of Rule 94 is that plaintiff in a stockholder's bill

"set forth with particularity the efforts of the plaintiff to secure such action as he desires on the part . . . if necessary, of the stockholders, and the causes of his failure to obtain such action."

The Rule assumes that in some cases the relief desired requires action from stockholders, and that in other cases no such action is necessary. No line of distinction between these two classes of cases is there drawn, for the reason that the Rule deals only with the allegations of a bill of complaint. It does not change substantive corporation law. It is not difficult then to

determine the distinction which the Court had in mind, for in announcing the principles embodied in Rule 94, the Court referred to a decision which defined the circumstances under which application to stockholders was necessary.

"Where the stockholders retain no control of the corporate business, except by means of an annual election of officers, those officers, during their term of service, represent the corporation for all purposes; and a refusal by them to take proper action for the protection of its interests, or to allow the use of the corporate name for that purpose, ought to be sufficient to justify a proceeding in behalf of the individual stockholders, making the corporation a party defendant."

Brewer vs. Boston Theatre, 104 Mass. 378, 387.

Of this decision the Court said—

"In *Brewer vs. Boston Theatre* (104 Mass. 378), the general doctrine and its limitations are very well stated."

Hawes vs. Oakland, 104 U. S. 450, 457.

No other distinction between the cases in which application to stockholders is necessary and those in which it is not, is suggested in *Hawes vs. Oakland* or in any subsequent case.

Furthermore—when the relief desired has been the institution and prosecution of a litigation for the assertion of corporate rights, this Court has frequently stated the substance of the Rule, without mention of any application to stockholders as in such cases a possible requirement. Thus in *Davis & Farnum Co. vs. Los Angeles*, the Court said:

"General equity rule 94 requires, that such a bill must contain an allegation under oath that the suit is not a

collusive one to confer on a court of the United States jurisdiction, and must also contain an allegation that the directors of a corporation have refused to institute the proceedings themselves in the name of such corporation, and the efforts of the plaintiff to secure such action on the part of the directors, and the cause of his failure to obtain it."

Davis & Farnum Co. vs. Los Angeles, 189 U. S. 207, 220.

Finally in a recent opinion, referring to cases where relief was to be had only by a law-suit, this Court seems to have excluded an application to stockholders from the proper reading of the Rule. In the case mentioned the Court said:

"The right of a stockholder to sue a corporation for the protection of his rights was recognized, the condition only being the refusal of the directors to act, which refusal, it is said, must be real, not feigned."

Doctor vs. Harrington, 196 U. S. 579, 588.

In this case the Court held under the facts, that even a demand upon directors was not necessary. The matter which is now of importance is that in so holding the Court referred to the hostile position of the directors as the "*only*" condition of the right of a stockholder to sue in his own name.

The Rule does not require, then, that plaintiff should always seek relief from stockholders. Questions which stockholders are competent to decide, must go to them for decision, but it is never necessary to submit to stockholders questions beyond their corporate power.

Furthermore, even questions which stockholders are competent to decide need not always be decided by resolution at a stockholders' meeting. If stockholders

are competent and willing to grant relief a vote may be necessary, but where aggrieved stockholders find eighty per cent. of the stock of a corporation arrayed against them, there is no rule which makes the vote at a stockholders' meeting exclusive evidence that appeal to stockholders is hopeless. Rule 94 makes no reference to stockholders' meetings, or to stockholders' votes. This, however, is the precise question asked by the Circuit Court of Appeals in this case, viz., Whether the fact that before institution of this suit complainants made no effort to obtain relief *"at a stockholders' meeting"* prevents them from maintaining this bill. It appears from the Certificate that for six months before this bill was filed there had been among Susquehanna stockholders an active opposition to the administration of the Delaware Company upon the matters involved in this suit, and that when the bill was filed the complainants holding 1312 shares and other stockholders, having altogether 6688 shares, measured the whole strength of the opposition.

The Circuit Court of Appeals, appears, like the Circuit Court, to consider this application to stockholders sufficient to answer every construction of the Equity Rule—unless it was necessary for complainants, already in a minority of three to one, to await a meeting and an adverse vote.

We believe that the question which arises under Rule 94, is in every case a practical question—whether directors first, and stockholders second, are able and willing to grant a remedy to injured parties.

When a large majority of stockholders unite in opposing the grant of any remedy this practical question is answered.

It is not necessary, however, to stop with one an-

swer, for the fact that in the present case stockholders were neither able nor willing to grant relief appears in many ways. We proceed therefore to consider the corporate power of stockholders in the Susquehanna Company, the nature of the relief to which complainants were entitled, the construction of Rule 94, and the extent of Delaware control of the stock vote when this bill was filed.

In the case at bar the relief desired was the institution and prosecution in good faith, of a litigation against the Delaware Company. It was not necessary to demand this relief of Susquehanna stockholders, for the following reasons:

1. *Under the charter of the Susquehanna Company stockholders had no power to grant relief, being unable to authorize or direct the institution of a suit or to control, influence or affect the prosecution of a suit once instituted.*

The Albany and Susquehanna Rail Road Company was incorporated under the New York Railroad Law of 1850 (Laws of N. Y., 1850, Chap. 140), Sec. 5 of which is, in part, as follows:

"Section 5. There shall be a board of thirteen directors of every corporation formed under this act, to manage its affairs."

The meaning of this provision is well understood.

"In a sense, the stockholders of a corporation own its property, but they are not the managers of its business or in the immediate control of its affairs."

Pullman Co. vs. Missouri Pacific Ry., 115 U. S. 587, 597.

Directors manage the business of the corporation and it is for this reason only that under Rule 94 application must be made to them.

The refusal of the board of directors, it is said,

"is essential in order to give the stockholder any standing in court, as the charter confers upon the directors representing the body of stockholders, the general management of the business of the company."

Memphis vs. Dean, 8 Wall. 64, 73.

It follows from this statement that when the relief sought is the institution of a law suit no demand upon stockholders is necessary, the *"only"* condition of a stockholder's right to sue being found in the adverse position of the Board of Directors.

Doctor vs. Harrington, 196 U. S. 579, 588.

This is emphatically shown in the case of *Railway Company vs. Alling,* 99 U. S. 463. In that case the stockholders at a meeting resolved to discontinue suits which were pending in this Court. The directors voted that the appeals should be prosecuted. The motions to dismiss were presented by counsel for stockholders and opposed by counsel for directors. This Court said:

"The present appeals are being prosecuted to final judgment by order of the directors or trustees of the appellant corporation. To them, by law, is committed the management of the property and concerns of the corporation. In all litigation involving the action of the corporation they are its representatives in court. . . . Their right, while in the exercise of their legitimate functions, to manage the affairs and suits of the company, ought not to be controlled or interfered with by this Court by reason of anything

which appears upon the pending motions. . . . The motions are, therefore, denied, and we proceed to an examination of the cases upon their merits."

This general rule is the law of New York.

In *McCullough vs. Moss*, 5 Denio 567, the question arose under the Laws of 1837, Chap. 396, Sec. 3, which provided that—

"The business and affairs of the said corporation shall be conducted by five directors."

The stockholders of the corporation attempted to make a corporate note by resolution at a meeting and the court held they could not thus bind the corporation, for (p. 575),

"The affairs of the corporation were to be conducted by five directors, a majority of whom formed a board for the transaction of business, and a decision of a majority of those duly assembled as a board was requisite to make a valid corporate act (1 R. S. 600, Sec. 6). The authority of the Board to the president and secretary was therefore necessary to give validity to the note. This was not shown. The resolution passed at the meeting of the stockholders contained in the letter of the secretary dated October 6, 1839, could not bind the corporation, especially so as to affect the members not present. When a charter invests a board with the power to manage the concerns of a corporation the power is exclusive in its character. The corporators have no right to interfere with it, and courts will not, even on a petition of a majority, compel the board to do an act contrary to its judgment (Angell and Ames on Corp. 121 to 123, 151 to 164). The stockholders as such in their collective capacity could do no corporate act. The directors were their representatives and alone authorized to act. It is one of the fundamental conditions of the contract into

which the corporators have entered by becoming members of the corporation, that its concerns shall be managed in the manner prescribed by the act of incorporation and from this no essential departure can be made."

In *Conro vs. Port Henry Iron Co.*, 12 Barb. 27, 63, where, as usual, the management of the corporation was confided to directors, it was held that a lease executed in pursuance of a resolution of the stockholders of a corporation was void, because the power of managing the business of the company was vested solely in the Board of Directors. So, the lease of a railroad property is made by the directors, not by stockholders. "The power to make it is, like all other general powers of management, lodged in the directors."

Beveridge vs. New York &c. R. Co., 112 N. Y. 1, 21, 23.

In *Robinson vs. Smith*, 3 Paige's Chancery 222 (N. Y. 1832), it was held that stockholders could not sue directors in the name of the corporation.

In *Day vs. Ogdensburgh &c. R. Co.*, 107 N. Y. 129, 145, the court said:

"The statute declares that every corporation organized as the defendant was, under the Act of 1850 (Chap. 140, § 5), shall have a board of directors to manage its affairs; and it must follow that, so long as no provision of law is violated, they are subject to no other supervision than that of the legislature."

These cases show the application of the word "management" to corporate affairs. The stockholders cannot make corporate notes, settle business claims, exe-

cute leases, or bring suits in the corporate name. These matters, being within the management of the corporation, are for directors, and "when a statute covers the whole subject, and prescribes the persons who may bind a corporate body and the manner in which they may bind it, resort cannot be had to other instrumentalities. The designation of certain agents and methods for the doing of an act implies a prohibition of any others." *Landers vs. The Frank Street Church,* 97 N. Y. 119, 124; *People ex rel. Attorney General vs. Utica Insurance Co.,* 15 Johns. 357; *N. Y. Firemen Insurance Company vs. Ely,* 2 Cow. 678; *Crocker vs. Whitney,* 71 N. Y. 161. Where stockholders try to usurp the powers of directors, the directors as the corporation's authorized agency can defeat them. *People vs. North River S. R. Co.,* 121 N. Y. 582, at p. 620. In fact, when the directors, in the management of the company, act *intra vires* and in good faith their authority is exclusive. Stockholders can neither instruct them nor control their action. The board of directors of a corporation have implied authority to do all acts in the management of the company's regular business which the company itself can do without a departure from its charter.

Dickerman vs. Northern T. Co., 176 U. S. 181, p. 193;
McMullen vs. Ritchie, 64 Fed. 253, 263;
Thompson on Corporations, Sec. 3974 *et seq.*;
Cook on Corporations, 5th ed., Secs. 684, 750;
Morawetz on Corporations, 2d ed., Sec. 511.

But, even if the corporate power of stockholders had enabled them by resolution to require directors to

institute litigation against the Delaware Company, nevertheless they could not oust directors from office before expiration of their term;

> Laws of New York, Act of 1850, Chap. 140, Sec. 5.

and no court would entertain a suit against the Delaware Company conducted by the Delaware administration of the Susquehanna Company.

> *South Spring Gold Co. vs. Amador Gold Co.*, 145 U. S. 300;
> *Mills vs. Green*, 159 U. S. 651;
> *East Tennesse &c. Co. vs. Telegraph Co.*, 125 U. S. 695.

Counsel for appellant, therefore, insist that even where stockholders can afford no relief directly, a demand must still be made upon them, if by electing a new board relief can indirectly be given. Upon this construction stockholders can grant relief in every case in which directors can grant relief. The rule, then, to justify the argument of counsel for appellant should be changed. The words "if necessary" should be omitted. As the rule stands complainants are commonly required to demand relief from the directors, and "if necessary" from the stockholders.

The relief desired in the case at bar was the institution and maintenance in good faith of a litigation against the Delaware Company.

But if demand for relief from stockholders was necessary, and if stockholders had no authority to institute and control a litigation, what, according to the con-

struction of counsel for appellant, would be the nature of the relief which complainants should have sought from stockholders? Plainly not a demand for institution of a litigation, but a demand for the election of a new Board of Directors,—a different demand, and one which often might be unjustifiable even where litigation should unquestionably be instituted. This would not be demanding relief from stockholders, but demanding a revolution in corporate management affecting matters with which the litigation might be wholly disconnected.

2. *Suits are regularly maintained in Federal courts without showing a previous demand upon stockholders for a resolution directing the institution of legal proceedings.*

A demand upon stockholders is never necessary where the matter is one in which directors have full power,—for in these matters stockholders are represented by directors. Thus a stockholder may sue

"in a case where application has first been made to the directors of the company to institute the suit in its own name, and they have refused. This refusal of the board of directors is essential in order to give the stockholder any standing in court, as the charter confers upon the directors representing the body of stockholders, the general management of the business of the company."

Memphis vs. Dean, 8 Wall. 64, 73;
Davis vs. Los Angeles, 189 U. S. 207.

Following this rule, stockholders' suits are regularly maintained without showing a previous demand upon stockholders for a resolution directing the institution of legal proceedings.

Cotting vs. Kansas City Stock Yards Co., 183 U. S. 79.

In this case the bill alleged a demand upon "the corporation and the acting president and managing director." Refusal was by order of the Board of Directors. See Record of case, p. 40. No demand upon stockholders.

Dinsmore vs. Southern Express Co., 183 U. S. 115.

The bill of complaint alleged that the "control, direction, management, and operation" of corporate affairs was by charter given to directors (Record of case, p. 3); that demand for litigation addressed to the corporation and its directors had been made to the Board of Directors and refused by the board (Record of case, p. 8); that the suit was not collusive, etc. No demand was made upon stockholders.

This Court approved the frame of the bill.

Smyth vs. Ames, 169 U. S. 466.

In this case demand was made upon the president and refused by order of the Executive Committee of the Board of Directors. Record of case, p. 24. No demand upon stockholders.

Pollock vs. Farmers' Loan & Trust Co., 157 U. S. 429.

Demand on directors only. Record of case, pp. 8, 10.

Perkins vs. Northern Pacific Ry. Co., 155 Fed. 445;
Weir vs. Bay State Gas Co., 91 Fed. 940;
Schultz vs. Highland Gold Mines Co., 158 Fed. 337;
Monmouth Investing Co. vs. Means, 151 Fed. 159;
Greenwood vs. Freight Co., 105 U. S. 13;
Ball vs. Rutland Railroad, 93 Fed. 513;
Dinsmore vs. Southern Express Co., 92 Fed. 714.

Ex parte Young, 209 U. S. 123, was an application in this Court for a writ of habeas corpus to review an order of the Circuit Court in Minnesota punishing petitioners for contempt. This order was made in a stockholders' suit, and the question presented to this Court concerned the jurisdiction of the court below.

If the stockholders who filed the bill had failed to show a situation which permitted them to assert the rights of the corporation, the court below might have had jurisdiction to dismiss the bill, but certainly would have had no jurisdiction to protect the corporate right by injunction or otherwise. The jurisdictional nature of Rule 94 is evident at this point, for here it touches the subject matter of the suit.

This Court, therefore, examined the allegations of complainants' bill, and showed that complainants averred a demand of the president and managing directors (209 U. S. p. 130). No demand upon stockholders was shown. Of this bill the Court said (p. 143):

"We find that the complainants in the suit commenced in the Circuit Court were stockholders in the Northern Pacific Railway Company, and the reason for commencing it and making the railroad company one of the parties defendant is sufficiently set forth in the bill. *Davis &c. Co. vs. Los Angeles,* 189 U. S. 207, 220; Equity Rule 94."

In the following cases the complainants' bill was dismissed—because the directors' refusal to sue was collusive.

Detroit vs. Dean, 106 U. S. 537;
Quincy vs. Steel, 120 U. S. 241;
Corbus vs. Gold Mining Co., 187 U. S. 455;
Dawson vs. Trust Co., 197 U. S. 178.

Finally in *Doctor vs. Harrington,* 196 U. S. 579, 588, we reach the statement, that when the relief sought is the institution of a law-suit to protect corporate rights application to the directors is the *"only"* condition of a stockholder's right to sue.

3. *There is no case in the reports of Federal courts in which a bill has been dismissed for want of a demand upon stockholders, for a resolution directing legal proceedings on behalf of the corporation.*

There are cases, like *Huntington vs. Palmer,* 104 U. S. 482, in which, dismissing collusive and fraudulent suits the Court has referred, as evidence of collusion, to the fact that no appeal was made either to directors, or to stockholders nor "that a single stockholder was consulted by the complainant" (p. 484).

There are cases holding that where stockholders have legal authority to grant the relief to which complainants are entitled, and where the stock vote is not subject to adverse control, a demand should be made upon stockholders. No instance can be found in which a law-suit instituted by a stockholder in good faith and without collusion was dismissed because complainant before filing his bill had failed to ask of stockholders a resolution directing institution of an action in the corporate name.

The case of *Taylor vs. Holmes*, 127 U. S. 489, does not touch the present question. In that case stockholders in a New York corporation, whose period of existence as fixed by its charter had expired, filed a bill "for themselves individually" and for such other stockholders as might join to assert rights owing to the corporation. The corporation itself was not made a party to the suit, complainants alleging that its officers were dead, that but one director survived, and as to this single survivor, it was charged that he was incompetent.

The Court held that under the laws of New York the existence of a corporation continued after the period fixed by charter, so far as necessary to wind up its business, collect its assets, pay debts, etc. This winding up could not be accomplished by stockholders suing "for themselves individually" (p. 490), etc., and the bill was dismissed. In order to wind up the corporation the company itself must to some extent be revived and for this purpose an appeal to stockholders might be necessary.

4. *The facts of this case show neither (a) anything which could be submitted to a stockholders' meeting*

for ratification, nor (b) anything, which even if within the corporate powers of stockholders, they could legally ratify.

(*a*) There is nothing capable of submission to stockholders.

It is familiar law that if directors make a conveyance or payment to, or a contract with themselves, the act—subject to certain limitations—is voidable not void, and may be confirmed by a vote of stockholders. Under these circumstances there is a corporate act capable of submission to stockholders, and their vote, operating directly upon this act is in itself effective. The stockholders' resolution, without further corporate action, produces its own proper result. Affirmance or disaffirmance being within the jurisdiction of the stockholders, their resolution makes a voidable act void, or valid and binding, as the case may be.

The present litigation, however, involves no such matter. A stockholders' vote ratifying the conduct of Susquehanna directors would not have deprived the board of power to institute suit the next day, nor would a resolution disapproving directors' conduct have compelled the institution of a suit.

There was nothing, therefore, capable of submission to stockholders; no corporate act upon which their vote could operate, and no obligation upon complainants before beginning suit, to ask for a vote which would have done nothing and been nothing.

(*b*) Even had the corporate power of stockholders been greater, they could not, as against any complaining shareholder, have sanctioned the exces-

sive benefits permitted the controlling shareholder out of the common fund.

The Certificate of the Circuit Court of Appeals shows that the Delaware Company has for many years controlled the administration of the Susquehanna Company, and that by means of this control, it has not only received the dividends upon its stock in the Susquehanna Company, at the same rate paid to other Susquehanna stockholders, but also that in addition to these payments it has—without compensation to the Susquehanna Company—secured possession of a sum of money equal to about one third of the entire capital stock of the corporation.

In *Pondir vs. New York &c. R. Co.*, 72 Hun 384, 389, where property had been transferred without consideration, it was held that a stockholders' bill would be sustained. "Such frauds are not uncommon in the management of corporations, and when they are exposed should be condemned by the courts and a heavy hand laid upon all who participate in them." Authorities on the subject are numerous.

"A majority of the corporators have no right to exercise the control over the corporate management, which legitimately belongs to them, for the purpose of appropriating the corporate property or its avails or income to themselves or to any of the shareholders, to the exclusion or prejudice of the others. And if any have obtained such unfair advantage by fraud or abuse of the trust confided to them as officers or agents of the corporation, it is not in the power of a majority to ratify or condone the fraud and breach of trust, so far as it affects the rights of the others, without reasonable restitution. . . . But the indirect appropriation of the common property, profits or means of profit, to their own benefit, by any portion of the corporators, in fraud of their

associates, is equally incapable of being authorized or ratified by the vote of a majority of the corporators, or by any act or omission of the corporate body. *Gregory vs. Patchett,* 33 Beav. 595; *Atwool vs. Merryweather,* Law Rep. 5 Eq. 464."

Brewer vs. Boston Theatre, 104 Mass. 378, 395.

The decision cited has the approval of this Court, *Hawes vs. Oakland,* 104 U. S. 450, 457.

"The corporation itself holds its property as a trust fund for the stockholders who have a joint interest in all its property and effects, and the relation between it and its several members is, for all practical purposes, that of trustee and *cestui que trust.* . . . When several persons have a common interest in property, equity will not allow one to appropriate it exclusively to himself, or to impair its value to the others. Community of interest involves mutual obligation. Persons occupying this relation towards each other are under an obligation to make the property or fund productive of the most that can be obtained from it for all who are interested in it; and those who seek to make a profit out of it at the expense of those whose rights in it are the same as their own are unfaithful to the relation they have assumed, and are guilty, at least, of constructive fraud."

Ervin vs. Oregon R. & N. Co. (*C. C. A.*), 27 Fed. 625, 631–2;
Jackson vs. Ludeling, 21 Wall. 616, 622.

Although a majority of stockholders may have full power to bind the body of stockholders in respect to transactions within the scope of the corporate powers, they have no right to exercise that power to appropriate corporate property to themselves at an inadequate price.

Ervin vs. Oregon R. & N. Co., 20 Fed. 577.

In *Mumford vs. Ecuador Development Co.*, 111 Fed. 639, 643, the court after citing a number of leading cases said:

"The rule deducible from all these cases is that although a majority may lawfully make a contract with the company such contract will be scrutinized with much greater care than if made with a third party, and unless it appears that it was made honestly and for an adequate consideration a court of equity will interpose to prevent such contract from being used oppressively and in violation of the rights of the minority. It matters not in what form these rights are invaded; it is the business of equity to penetrate through subterfuges and discover the actual transaction stripped of all disguises. . . .

"The theory upon which the courts interfere in such cases is tersely expressed by Sir William M. James in *Menier vs. Telegraph Works*, 9 Ch. App. 350. He says:

" 'The minority of the shareholders say in effect that the majority have divided the assets of the company, more or less, between themselves, to the exclusion of the minority. I think it would be a shocking thing if that could be done, because if so, the majority might divide the whole assets of the company, and pass a resolution that everything must be given to them, and that the minority should have nothing to do with it.

"In *Gamble vs. Q. C. W. Co.* 123 N. Y. 91, . . . Judge Peckham, in effect, said that, although it is not every question of mere administration or of policy upon which there might be a difference of opinion that would justify the minority in coming into a court of equity to obtain relief, yet, where the action of a majority of the stockholders of a corporation is fraudulent or oppressive to the minority shareholders, an action may be maintained by the latter, where

the contemplated action of the majority is so far opposed to the interests of the corporation as to lead to a clear inference that such action is with an intent to serve some outside purpose, regardless of the consequences to the company and inconsistent with its interests." . . . "*Sage vs. Culver* (147 N. Y. 241) is to the effect that when it can fairly be gathered that the officers and directors of a corporation have made use of relations of trust and confidence to secure or promote some selfish interest, it is enough to set a court of equity in motion, and to require them to explain such a transaction which there is a presumption against in equity."

Farmers' Loan & Trust Co. vs. N. Y. & N. R. Co., 150 N. Y. 410, 426, 427.

In *Atwool vs. Merryweather* reported as a note in L. R. 5 Eq., at p. 464, Vice-Chancellor Sir W. Page Wood held that a majority of stockholders could not gratuitously condone a fraud. "The whole thing," said Vice-Chancellor Wood, "was obtained by fraud, and the persons who may possibly form a majority of the shareholders, could not in any way sanction a transaction of that kind."

See, too, *Hazard vs. Durant*, 11 R. I. 206–207.

"The attempt is to strip the company of its property, in which the complainant as a stockholder has a direct interest, and there is such a disregard of duty and non-performance of manifest official obligation, amounting to what the law considers a breach of trust, that it is a case in which the stockholder has a right to interfere. It does not involve a discretion as to the bringing of suit which ought properly to be left to the judgment of the board of directors or of the majority of the stockholders, for here a portion of the corporate property and the exercise of the franchises of the

company over the route in question are in jeopardy, and its officers, in disregard of their duty, are consorting with its enemies . . ."

Weidenfeld vs. Sugar Run Co., 48 Fed. 615.

5. *Complainants desiring institution of a law-suit were not obliged by Rule 94 to ask for election of a new Board of Directors.*

Counsel for the Delaware Company argue that even though stockholders cannot institute and manage a litigation directly, they can indirectly effect this result by election of a new board of directors, and that for this reason complainants were bound by the 94th Equity Rule, to apply to stockholders for election of a new board, before they could be justified in filing a bill in their own name. *No case can be found in which a bill filed by stockholders in good faith and without collusion was dismissed because complainants had failed to make this demand.* Stockholders desiring one relief are not obliged by the Rule to ask for something else—which they may not want. If they desire a law-suit they need not ask for a corporate revolution and the election of a new Board. If the stockholders cannot instruct the existing Board to institute a law-suit, they cannot instruct the new Board. If the new Board then have the matter in their entire discretion to determine, the corporate revolution amounts to nothing more than this—that stockholders being without power to grant relief refer complainants to the one corporate authority competent to act. A reference to somebody else is not relief. If the 94th Rule included within its contemplation every consequence which stockholders might indirectly effect by election of new directors the

words "if necessary" would have been omitted, for by this construction stockholders would pass upon every question; and reference to them in every case would be necessary. The term of office for directors and officers —which now under the Susquehanna charter lasts a year—would necessarily be shortened, for every reference to stockholders would be answered by the election of a new Board—or else stockholders would be limited to granting relief in one case per year. For all this, which is involved in appellant's argument, we find no authority. The Rule requires good faith in appealing to federal courts. As evidence of this good faith it requires, in certain circumstances, a demand for relief from the corporate authorities competent to grant relief. The question in every case, therefore, is of corporate authority,—under the charter, what person or persons have power to redress the grievance of which complaint is made?

In the case at bar this question is answered by reference to the Susquehanna charter.

6. *At the time this action was instituted the Delaware Company controlled the stock vote of the Susquehanna Company.*

(*a*) No rule of law defines stock control as registered ownership of a majority of outstanding shares.

"No rule of law makes the control of a corporation depend upon the ownership of a majority of all its shares. On the contrary, the rule, of course, is that a majority in interest of the shareholders present at the corporate meetings from time to time govern the corporation. And it is notorious that many shareholders habitually neglect to attend

corporate meetings, or take any part whatever in the affairs of the corporations of which they are members, and many others habitually hand over their votes to the dominant shareholder or group of shareholders. In this way the number of shares needed to control a corporation is reduced much below a majority of the entire issue: how much below is a question of fact to be determined in each particular case. Only in the ideal instance where all the shareholders might be expected to attend the corporate meetings would it hold true that a majority of all the shares of a corporation is required to control it. On all sides in the business world are instances where the control of a corporation is just as firmly held through the ownership of a large minority of its shares as through the ownership of a majority, and the knowledge that this is so is acted upon every day. In a recent inquiry by the Interstate Commerce Commission a member of a banking house, with probably as much experience in such matters as any other in the world, testified that even 29.59 per centum of the shares of a railroad corporation were generally sufficient to give control. It is therefore perfectly evident that if control is shown to exist in fact, it is a mere non-essential, whether it exists by virtue of the ownership of a majority of the shares of the corporation or of a smaller number; and unless this is recognized and acted upon by the courts, as it has been by bankers and promoters of corporate combinations, the way to evade the decision, that the act of Congress"—the Sherman Act—"reaches the form of monopoly resulting from the concentration of controlling stock interests in competing railroads in the same hands, is clear, simple, and certain."

> "The Federal Anti-Trust Act and Minority Holdings," by Mr. G. Carroll Todd, 22 Harv. Law Rev. 117.

The testimony to which Mr. Todd refers is that given before the Interstate Commerce Commission by

Mr. Kahn of the firm of Kuhn, Loeb & Company and mentioned in the Report of the Commission contained in 12 Int. Com. Rep. 277, at p. 294.

In the present case the Susquehanna stock owned or controlled by the Delaware Company amounted to 25.25 per cent. of the entire capital stock of the company. The Delaware Company therefore lacked a little of the number of shares which Mr. Kahn—and the Commission, 12 Int. Com. Rep. 294—considered "sufficient generally to secure a dominating interest."

In the Special Report of June 30, 1906, the Commission referring to the fact that stock control is almost invariably maintained through minority holdings, remarked (p. 37),

"Yet, because of the wide distribution of majority ownership, the stock being in many cases held for investment in small lots by individuals, and because the proxies of such holders are frequently signed as a matter of form and without any investigation, these minority holdings in concentrated form virtually dominate the situation and dictate the policy of the corporation whose securities are thus held."

And, on p. 44,

"The conclusion is indisputable that railway corporations do not purchase railway stocks widely for purposes of investment, but that their holdings in the stocks of other railways are rather for the purpose of controlling or influencing the management of corporations whose operations are of real concern to the holding company."

The number of shares necessary to make stock control in particular cases therefore will vary. Where control has been established and maintained for a number of years, however, there is a legal presumption, no change being shown, that this control continues.

(*b*) When this bill was filed the Delaware Company controlled the stock vote of the Susquehanna Company.

The Certificate shows that for many years before this suit was brought the Delaware Company had elected its candidates on the Susquehanna Board of Directors; that a Committee of Susquehanna stockholders had for six months before the suit was brought "been opposing the administration of the Delaware Company upon the questions involved in this bill" (p. 3), and that at the end of this time, Committee and complainants together could vote upon 8000 shares only.

The remainder of the stock therefore, did not oppose the administration of the Delaware Company upon the questions involved in this bill.

Complainants did not institute their suit hastily nor until six months' agitation among stockholders had disclosed the fact of stock control. The statements of the Certificate therefore justify the allegation of the bill that the Delaware Company controlled the stock vote of the Susquehanna corporation. This allegation is further justified by the developments since the institution of this litigation.

It has been said that control being once shown to exist, there is a legal presumption, no change being shown, that this control continues. Three months and a half after this suit was begun, and just before the annual meeting of Susquehanna stockholders, the directors of the Susquehanna Company aligned the corporation with the Delaware Company in opposing upon the merits the claim advanced on behalf of Susquehanna stockholders. Their action was com-

municated to all Susquehanna shareholders "and thereafter and before the meeting proxies for several thousand shares" (p. 3) were received by opponents of the Delaware Company with the result that out of an extraordinarily large vote the Delaware Company was defeated by sixty votes.

The Certificate, then, states all the facts which constitute stock control, it shows the extent of the control when the bill was filed, and the events which caused the change.

It shows further a vigorous and far reaching campaign by those who opposed Delaware control, but *no construction of Rule 94 requires a campaign for corporate control.* Had complainants delayed bringing suit, and in October, 1906, in strict conformity with appellant's construction of the rule submitted to the stockholders represented at the annual meeting the question of proceeding against the Delaware Company, the Delaware Company would have controlled the vote on that question.

Sending out campaign literature to stockholders before a meeting is an expensive undertaking and effective only when followed by vigorous campaigning employing the time and service of many experienced persons. When this is not done, a stockholders' meeting—even of the largest corporations—is an assembly of a few persons who witness the proxy committee of the administration cast the official ballot.

The memory of those best acquainted with the history of corporate affairs during the last half century may safely be challenged to produce another instance in which a corporation situated as the Delaware Company was when this suit was begun has failed to hold the control it then had.

7. Complainant stockholders were entitled to protect themselves by suit in equity, against the danger that the Delaware Company, being in control of the Susquehanna Board, might at any time cause the two corporations—lessor and lessee—to make such adjustment and compromise as would seriously embarrass the Susquehanna Company.

In the case of the Harlem Company leased to the New York Central—a recent and very conspicuous case—such an adjustment was in fact made; and when the Continental Insurance Company filed its bill, the suit was too late.

Continental Insurance Co. vs. New York and Harlem R. Co., 187 N. Y. 225.

Complainants were not bound to put themselves into the hands of the Delaware Company, either in fact or in theory; and for this reason, when the present bill was filed, complainants prayed for an injunction whereby

"the defendants may be enjoined and restrained from making any settlement of the matters in controversy or from entering into any reference or arbitration of them without leave of this honorable court, and that for the purposes aforesaid a temporary restraining order may issue." (Rec. p. 22.)

When the whole subject was thus brought before the court, complainants were protected from such compromise as until the bill was filed, might have been made by the Delaware Company in its own interest.

The situation of stockholders whose corporation is

in the hands of their adversaries is an extremely difficult one. Unless stockholders sue, their rights are subject to a compromise in which adverse parties represent both sides. If stockholders anticipate this disaster by instituting legal proceedings they are met by the constructions of the 94th Rule which counsel for the Delaware Company advance.

We submit that the Rule has no applications to such a case as the one at bar.

II

Complainants are entitled to maintain this Bill by reason of their direct relations to both Defendant Corporations.

Before taking up this subject it is necessary to refer to the statement of counsel for appellant that the bill cannot be treated both as a stockholders' bill and as a bill by guaranteed stockholders, for it is argued this would make the bill multifarious. The Circuit Court, it is said, granted no pecuniary relief individually to complainants and upon this statement counsel argue—

> "The consequence of this action by the Circuit Court was not only to avoid the objection of multifariousness, but also to eliminate all question of the right of guaranteed stockholders to sue in equity, some in behalf of all others."
>
> (Memorandum of Delaware & Hudson Company upon Appellees' Motions to Advance, p. 4.)

To this we answer:

(*a*) Complainants' rights as guaranteed stockholders are not "eliminated." The questions certified by the Circuit Court of Appeals ask whether we can maintain the bill. Complainants assert two grounds for the same relief. If the bill can be maintained on either ground the questions are answered.

(*b*) The purpose of referring to, and attaching the pleadings to, the Certificate was to place both these grounds of relief before this Court.

(*c*) Since the lease, and guarantees to stockholders, were all parts of the transaction upon which we sue, we can sue in no other way than by placing the whole transaction before the court.

(*d*) No question of multifariousness is certified to this Court.

(*e*) The bill was not multifarious.

Aetna Ins. Co. vs. Albany & Susquehanna R. Co., 156 Fed. 132.

The question of complainants' right to sue by reason of their direct relations with both defendant corporations being before this Court, we proceed to a consideration of this second branch of the case.

In accordance with the provisions of the lease the Delaware Company has endorsed upon Susquehanna stock certificates, a reference to the lease and has agreed with stockholders to pay directly to them certain sums out of the annual rent arising from the leased property.

It is complainants' contention and the substance of the bill of complaint that the lease established a fixed rent to be paid annually by the Delaware Company; that the Delaware Company agreed to pay annually

out of this fixed sum certain interest charges, etc., and to divide the balance by payments to the stockholders, and to the corporation. This contention was sustained by the decree of the Circuit Court.

We are not here concerned with any question as to the correctness of this decision.

The subject brought before this Court, in this aspect of the case, is whether Rule 94 prevents complainants from submitting for judicial construction such a case as is made by the complainants.

We believe that the Delaware Company has assumed the obligation to divide among Susquehanna stockholders certain Susquehanna income, an obligation which, in the absence of this contract, would rest upon the Susquehanna corporation alone. The Delaware Company then can be sued directly by Susquehanna stockholders whenever it fails to perform this duty, just as the Susquehanna Company could be sued by its own stockholders. Obviously no demand need be made upon the Susquehanna corporation before bringing such a suit, for the purpose of the action would be to compel performance of a duty owing by the Susquehanna Company directly to its stockholders, and, as against the Delaware Company, to compel it to perform the contract by which it assumed this duty. Holders of guaranteed stock, in other words, where the guarantee provides for payments to stockholders out of a fixed income,—as is true in many leases—occupy a position which in some respects differs from that of the ordinary stockholders, and while this difference is not such as to affect the distribution among stockholders of the earnings of the common property —equality being the rule in every case; and no preferences, and no remedies which would result in the

establishment of preferences, being permitted—nevertheless guaranteed stockholders having a direct relation to the guarantor by whom the payments are made and being entitled to certain equal payments, have the right to compel these payments and equal distribution.

All rent, owing by the Delaware Company, arises out of the lease of property belonging to the Susquehanna corporation. If the covenant of quiet enjoyment be broken, the obligation to pay rent ceases. All rent which accrues is corporate income.

Pacific R. R. vs. Atlantic & P. R. Co., 20 Fed. 277.

By arrangement between the parties it may be paid in any manner upon which the parties agree, but however paid it must be credited upon the indebtedness to the Susquehanna corporation arising out of the use of corporate property.

If, therefore, the payment be made to other parties than the Susquehanna corporation, those parties necessarily receive it in the corporate right—not in their own right. All sums which this action is brought to collect are therefore sums which are owing to the Susquehanna corporation.

What, then, is the importance of the Delaware guarantee?

Corporate income—creditors having first been provided for—belongs to the corporation for the benefit of its stockholders. Division of surplus income ordinarily is made by the corporation itself—the dividend being declared by the Board of Directors and paid by corporate officers.

In the case at bar no dividend has been declared and

no funds are in the possession of the Susquehanna corporation. In place of the method of division ordinarily followed, the stockholders have authorized the corporation to entrust this division to the Delaware Company, upon its undertaking with each stockholder to pay and divide—the payment of Susquehanna rent being made by the very act of division. To speak with logical precision, therefore, the rent is claimed in the corporate right of the Susquehanna Company, but the division of corporate income is claimed in the right of the stockholder.

The practical result of this union of interests—payment and division being substantially identical except in logic—is by giving stockholders a direct right to compel division to give an indirect right to compel payment. This indeed is the very purpose of a stock guarantee, contemplated when the stockholders were brought in to participate in the making of a corporate contract.

In a bill filed for this purpose, when the corporation is in adverse control, complainants may pray that the division among stockholders of money recovered by the corporation be made under the orders of the Court.

Dunphy vs. Traveller Newspaper Ass'n, 146 Mass. 495;
Crumlish vs. Shenandoah Valley R. Co., 28 W. Va. 623.

These principles and the right of complainants to file the present bill in their own name are suggested by the decision in *Hawes vs. Oakland,* so much discussed in this case.

"That the vast and increasing proportion of the active business of modern life which is done by corporations

should call into exercise the beneficent powers and flexible methods of courts of equity, is neither to be wondered at nor regretted; and this is especially true of controversies growing out of the relations between the stockholders and the corporation of which he is a member. The exercise of this power in protecting the stockholder against the frauds of the governing body of directors or trustees, and in preventing their exercise, in the name of the corporation, of powers which are outside of their charters or articles of association, has been frequent, and is most beneficial, and is undisputed. These are real contests, however, between the stockholder and the corporation of which he is a member.

"The case before me goes beyond this.

"This corporation, like others, is created a body politic and corporate, that it may in its corporate name transact all the business which its charter or other organic act authorizes it to do.

"Such corporations may be common carriers, bankers, insurers, merchants, and may make contracts, commit torts, and incur liabilities, and may sue or be sued in their corporate name in regard to all of these transactions. The parties who deal with them understand this, and that they are dealing with a body which has these rights, and is subject to these obligations, and *they do not deal with or count upon a liability to the stockholder whom they do not know and with whom they have no privity of contract or other relation.*"

Hawes vs. Oakland, 104 U. S. 450, 453.

Here, then, is the authoritative statement of the rule which requires assertion of corporate rights in the corporate name; the exposition of the principles on which the rule rests and the class of cases to which it applies. From this one fact it is obvious,—that Rule 94 applies only to cases in which no direct relations

exist between stockholders and persons dealing with their corporation.

Into contests between stockholders and their corporation *"the outsider, dealing with the corporation through its managing agents* in a matter within their authority, cannot be dragged . . ."

Hawes vs. Oakland, 104 U. S. 450, 454.

In the case at bar, the Delaware Company is not an outsider, it has dealt not alone with the Susquehanna corporation, but with every Susquehanna stockholder, and with each stockholder—including individually the complainants in this suit—it has entered into privity of contract, by a written guaranty running under its corporate seal. We do not seek to drag the Delaware Company into litigation with "stockholders whom they do not know," for the Delaware Company which might have occupied strictly the position of an "outsider,"—a third party leasing corporate property and paying rent to the lessor Company,—has voluntarily abandoned this position and assumed the corporate duty of the Susquehanna Company to divide among stockholders the rent owing to the lessor.

Since now this duty is not performed and an action has become necessary who shall be made defendants?

Plainly the action must be brought against the Albany and Susquehanna Rail Road Company, the corporation which owes the duty,—and against the Delaware and Hudson Company, the corporate agent of the Susquehanna, holding in its treasury the money which it should have paid and divided.

No other suit can be framed which gives to com-

plainants the relief to which they are entitled. In a case like the one at bar the New York Court of Appeals said:

"It would seem that it is only through an equitable action that the proper relief can be obtained, and but for this the plaintiffs would be without means of redress."

Barr vs. New York &c. R. Co., 96 N. Y. 444, 452.

Such a suit must, of course, be on behalf of all stockholders, for if separate suits by different stockholders were permitted one of two results would follow—either the tenant would lose as against the portion of the rent involved in these suits its right to assert whatever off-set it might lawfully have, or, on the other hand, it would be compelled to take the whole off-set out of the portion of rent going to stockholders who sued first. Plainly such separation of interests is impossible, and plainly, too, the off-set must be taken out of the whole rent. The action which guaranteed stockholders are entitled to bring in their own name must, therefore, as has been said, be brought in equity on behalf of all stockholders similarly situated.

The guarantee endorsed upon the stock certificate is not a separate contract, made every time a new certificate issues, but is part of the covenant to pay rent. Taken by itself there is no consideration for the guarantee. Taken with the lease the demise of the entire property is the single undivided consideration for the entire covenant to pay and divide the entire rent.

In the last analysis therefore a "guarantee of dividends" when applied to such a case as that at bar is an inaccurate phrase which seems to describe a simple relationship, but in fact covers two entirely distinct relations.

As lessee of the Railroad property the Delaware Company is bound to pay the agreed rent, and if out of the lease claims arise in its favor against the Susquehanna Company, the lessee is as to these claims a creditor of the lessor entitled to payment before any sum be paid to or on account of, the Susquehanna Company. No action can be brought against the lessee in such form as to defeat this right of off-set. The only action which can be brought to compel payment of the rent must be therefore one single action on the lease to collect the entire sum due.

So far as the Delaware Company by virtue of its contracts of "guarantee" occupies the position of agent for the Susquehanna corporation to divide corporate income among stockholders it is subject to the same legal proceedings that could be brought against the Susquehanna Company itself. It must be observed, however, that no dividend has been declared. The lease and guaranties were made nearly forty years ago. They fixed a rent out of which dividends at a certain rate would naturally arise,—nevertheless the operation of the contract is subject to all ordinary contingencies. The lessee, for example, might become entitled to make deductions from the rent before payment. In the present case, for example, the Delaware Company claims allowance of offsets which would absorb all dividends for many years to come. A suit upon the guarantee is not therefore a suit to collect a dividend which has been earned and declared, but is strictly a suit to determine the amount of net corporate earnings and to compel distribution. Such a suit must be by bill for an accounting in equity.

Cook on Stock and Stockholders, 5th ed., Sec. 542, and cases cited.

Whether the present action be considered as a stockholders' bill asserting contract rights due to the corporation, or as a guaranteed stockholders' bill enforcing a corporate contract to which the stockholders as a body are parties, the nature of the action and the relief sought are identical—a bill enforcing a corporate contract and praying for an accounting of the entire rent arising upon a single demise of a single property.

There is a certain complexity in the relations of stockholders who are guarantee-holders at the same time, but the complexity arises from the facts, not from the form of the suit arising upon the facts.

E. PARMALEE PRENTICE,
for Aetna Insurance Company and other
Complainants-Appellees.

GEORGE WELWOOD MURRAY,
CHARLES P. HOWLAND,
Of Counsel.

DELAWARE AND HUDSON COMPANY *v.* ALBANY AND SUSQUEHANNA RAILROAD COMPANY.

CERTIFICATE FROM THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

No. 416. Argued February 23, 24, 1909.—Decided May 3, 1909.

Equity rule No. 94, which is intended to secure the Federal courts from imposition upon their jurisdiction, recognizes the right of the corporate directory to corporate control, and expresses primarily the conditions which must precede the right of the stockholders to protect the corporation in cases where the directory is derelict; but the requirements of the rule may be dispensed with where they do not apply by reason of antagonism between the directory and the corporate interest.

Equity rule No. 94 is intended to have a practical application and it does not apply where the corporate interests can only be protected by a suit, which, if successful, would be detrimental to all the directors in other capacities.

Where, as in this case, stockholders of a lessor corporation sued, for its benefit, the lessee corporation, the directors of the two corporations being almost identical and the lessee corporation also owning, or

holding the voting power, of sufficient stock of the lessee corporation to control a stockholders' meeting, the fact that the stockholders bringing the suit made no demand for relief upon the board of directors nor any effort to obtain relief at a stockholders' meeting does not prevent them from maintaining the bill.

Quære, and not decided, whether stockholders have power to compel directors to institute suits to which the latter are opposed.

THE facts, and the questions certified, are stated in the opinion.

Mr. James M. Beck, with whom *Mr. Alfred Opdyke* was on the brief, for the Delaware & Hudson Company:

Before a shareholder "is permitted in his own name to institute and conduct a litigation which usually belongs to the corporation, he should show to the satisfaction of the court that he has exhausted all the means within his reach to obtain within the corporation itself the redress of his grievances or action in conformity to his wishes. He must make an earnest, not a simulated, effort with the managing body of the corporation to induce remedial action on their part, and this must be made apparent to the court." *Hawes* v. *Oakland*, 104 U. S. 450; *Foss* v. *Harbottle*, 2 Hare, 461; *Macdougall* v. *Gardiner*, 1 Chancery Div. 13.

The stockholder of a corporation cannot on his individual responsibility commence an action for the benefit of the corporation against another corporation, without first applying to the managing body of his corporation to do so, and the fact that a majority of such managing body are also officers, directors, or employés of the corporation against which the suit is sought to be brought will not, in the absence of fraud, excuse the failure of the stockholder to make such application.

The only question which seems open to discussion is whether the mere fact that a majority of such board were also "officers, directors or employés" of the company sought to be sued, and that some of them had only a nominal stock interest in the Susquehanna Company, in itself and in the absence of any

circumstances of fraud, so conclusively demonstrates the futility of such application as to excuse it. This conclusion could be justified only on the assumption that there is a conclusive presumption of law that the directors of a corporation will not institute a suit against another corporation, with which a majority are identified either as "officers, directors or employés."

The vice of the appellees' position is that they gratuitously assume that the directors of the Susquehanna Company, men of recognized standing and probity in the business world, would have been faithless to the trust reposed in them, and this solely for the reason that a majority were, as officers, directors or employés, also identified with the Delaware Company.

Certainly the presumption that directors will fully discharge their duties to all the stockholders should not be overborne at least until they have first refused, upon demand, to bring suit under conditions that will fully safeguard the interests of the stockholders, and until such demand and refusal the ordinary presumption of fidelity to a trust, as anounced by this court, still remains. *Hawes* v. *Oakland*, 104 U. S. 450; *Detroit* v. *Dean*, 106 U. S. 537; *Dimpfell* v. *Ohio Ry. Co.*, 110 U. S. 209; *Quincy* v. *Steel*, 120 U. S. 241; *Taylor* v. *Holmes*, 127 U. S. 489.

This rule is laid down in *Corbus* v. *Alaska Co.*, 187 U. S. 455, and also in *Dodge* v. *Woolsey*, 18 How. 331; *Greenwood* v. *Freight Co.*, 105 U. S. 13; *Pollock* v. *Farmers' Loan & Trust Co.*, 157 U. S. 429. *Doctor* v. *Harrington*, 196 U. S. 579, relied upon by appellees, was exceptional and bears no resemblance to this case. And *Chicago* v. *Mills*, 204 U. S. 321, and *Ex parte Young*, 209 U. S. 123, 143, can also be distinguished.

Rule 94 itself assumes that the directors are presumed to act honestly and according to their best judgment for the interests of all, and this presumption cannot be overborne by the mere assertion of futility or by the pleader's license in the use of adjectives or adverbs. The fraud charged and proven

must be actual and not constructive. "Epithets do not make out fraud." *Kent* v. *Canal Co.*, 144 U. S. 91; *Fogg* v. *Blair*, 139 U. S. 127.

In the following cases in state courts the bill was held not to be maintainable. *Wolf* v. *R. R. Co.*, 195 Pa. St. 91, 95; *Siegman* v. *Maloney*, 65 N. J. Eq. 372; *Brewer* v. *Boston Theatre*, 104 Massachusetts, 378; *Dunphy* v. *Traveller Assn.*, 146 Massachusetts, 495; *O'Connor* v. *Virginia*, 184 N. Y. 46, 53.

If the complainants were excused under the facts certified from making any preliminary demand upon the directors, they nevertheless must show, in order to maintain their suit, that they could not have secured corporate action by an appeal to the stockholders of the Susquehanna Company. *Hawes* v. *Oakland*, 104 U. S. 450; *Foss* v. *Harbottle*, 2 Hare, 461; *Huntingdon* v. *Palmer*, 104 U. S. 482; *Quincy* v. *Steel*, 120 U. S. 241; *Chicago* v. *Mills*, 204 U. S. 321; *Doctor* v. *Harrington*, 196 U. S. 579.

Mr. E. Parmalee Prentice, with whom *Mr. George Welwood Murray* and *Mr. Charles P. Howland* were on the brief, for The Albany and Susquehanna Railroad Company *et al:*

Complainants are entitled under the facts stated by the Circuit Court of Appeals to sue as stockholders in the Susquehanna Company asserting rights due that corporation. They were not required before instituting this suit to demand relief from the directors of the Susquehanna Company. The present case is not within the purpose of Equity Rule 94 which is to prevent the maintenance of suits in Federal courts by collusion between complainants and the defendant corporation whose rights they assert. *Hawes* v. *Oakland*, 104 U. S. 450; *Citizens' Trust Co.* v. *Illinois Central R. Co.*, 205 U. S. 46, 47; *Doctor* v. *Harrington*, 196 U. S. 579, 588; *Chicago* v. *Mills*, 204 U. S. 321; *Young* v. *Mining Co.*, 71 Fed. Rep. 810; *Eldred* v. *American &c. Co.*, 99 Fed. Rep. 168.

The certificate shows that this suit is not collusive.

The present case is not within the requirements of Equity

Rule 94, as to demand upon directors. The bill shows under oath that directors were hostile, that demand upon them would be idle and nugatory.

Equity will not permit double directors, by contracts made with themselves in other capacities, to bind shareholders or the corporation. *Wardell* v. *Railroad Co.*, 103 U. S. 651; *Twin-Lick Oil Co.* v. *Marbury*, 91 U. S. 587.

A court will not entertain litigation in which both sides are controlled by one *dominus litis*. *South Spring Gold Co.* v. *Amador Gold Co.*, 145 U. S. 300; *Mills* v. *Green*, 159 U. S. 651, 654; *East Tennessee &c. Co.* v. *Telegraph Co.*, 125 U. S. 695; *Hatfield* v. *King*, 184 U. S. 162. In fact parties who bring such litigation without disclosing the relationship of parties are guilty of punishable contempt of court. *Lord* v. *Veazie*, 8 How. 251; *Little* v. *Bowers*, 134 U. S. 547, 557; *Hatfield* v. *King*, 184 U. S. 162.

When directors are under adverse control stockholders may sue without demand for relief from a hostile board. *Citizens' Trust Co.* v. *Illinois Central Railroad*, 205 U. S. 46; *Doctor* v. *Harrington*, 196 U. S. 579; *Corbus* v. *Gold Mining Co.*, 187 U. S. 455; *Heath* v. *Erie Railway Co.*, 8 Blatch. 347, 409; *Bill* v. *Telegraph Co.*, 16 Fed. Rep. 14, 19; *Columbia Dredging Co.* v. *Washed Bar Sand Dredging Co.*, 136 Fed. Rep. 710; *Bigelow* v. *Calumet & Hecla Mining Co.*, 155 Fed. Rep. 869; *Dickinson* v. *Traction Co.*, 114 Fed. Rep. 232; *Eldred* v. *American &c. Co.*, 99 Fed. Rep. 168; *Berwind* v. *Canadian Pac. Ry. Co.*, 98 Fed. Rep. 158; *Ball* v. *Rutland R. Co.*, 93 Fed. Rep. 513; *Weir* v. *Bay State Gas Co.*, 91 Fed. Rep. 940; *Rogers* v. *Nashville &c. Ry. Co.*, 91 Fed. Rep. 299; *De Neufville* v. *Railroad Co.*, 81 Fed. Rep. 10.

Complainants were not required before instituting this suit to demand relief at a meeting of Susquehanna stockholders. See *Brewer* v. *Boston Theatre*, 104 Massachusetts, 378, 387.

Demand on stockholders was not necessary in this case because under the Susquehanna charter stockholders could not grant relief. Laws, New York, 1850, Ch. 140.

In all litigation involving the action of the corporation they (the directors) are its representatives in court. Stockholders cannot control or interfere with their management. *Railway Co.* v. *Alling*, 99 U. S. 463, 472; *Pullman Co.* v. *Missouri Pacific R. Co.*, 115 U. S. 587; *Beveridge* v. *New York &c. R. Co.*, 112 N. Y. 1, 21, 23; *Robinson* v. *Smith*, 3 Paige, Ch. 222; *McCullough* v. *Moss*, 5 Denio, 567; *Conro* v. *Port Henry Iron Co.*, 12 Barb. 27; Morawetz on Corps., 2d ed., §§ 283, 510; Cook on Corps., 5th ed., §§ 684, 750.

Even if stockholders could by resolution require directors to institute litigation against the Delaware Company, they could not oust directors from office, before expiration of their terms. Laws, New York, Act of 1850, ch. 140, § 5.

No court would entertain a suit against the Delaware Company conducted by the Delaware administration of the Susquehanna Company. *South Spring Gold Co.* v. *Amador Gold Co.*, 145 U. S. 300; *Mills* v. *Green*, 159 U. S. 651; *East Tennessee &c. Co.* v. *Telegraph Co.*, 125 U. S. 695.

Suits are regularly maintained in Federal courts without demand upon stockholders for a resolution directing litigation. *Ex parte Young*, 209 U. S. 123; *Cotting* v. *Kansas City Stock Yards Co.*, 183 U. S. 79; *Dinsmore* v. *Southern Express Co.*, 183 U. S. 115; *Smyth* v. *Ames*, 169 U. S. 466; *Pollock* v. *Farmers' &c. Trust Co.*, 157 U. S. 429; *Greenwood* v. *Freight Co.*, 105 U. S. 13; *Schultz* v. *Highland Gold Mines Co.*, 158 Fed. Rep. 337; *Perkins* v. *Northern Pacific Co.*, 155 Fed. Rep. 445; *Monmouth Investing Co.* v. *Means*, 151 Fed. Rep. 159; *Weir* v. *Bay State Gas Co.*, 91 Fed. Rep. 940; *Ball* v. *Rutland Railroad Co.*, 93 Fed. Rep. 513; *Dinsmore* v. *Southern Express Co.*, 92 Fed. Rep. 714.

No case was ever dismissed from a Federal court for want of an application to stockholders for a resolution directing litigation on behalf of the corporation.

There was nothing to submit to stockholders.

When a stockholders' vote makes a voidable act valid or void, it acts upon something which directors have done. In

this case directors have done nothing and stockholders cannot control their course.

Stockholders cannot, by anything short of a unanimous vote, authorize or ratify gifts of corporate property. *Brewer* v. *Boston Theatre*, 104 Massachusetts, 378; *Jackson* v. *Ludeling*, 21 Wall. 616; *Ervin* v. *Oregon R. & N. Co.*, 27 Fed. Rep. 625, 631; *Mumford* v. *Ecuador Development Co.*, 111 Fed. Rep. 639; *Menier* v. *Telegraph Works*, L. R. 9 Ch. App. 350; *Gamble* v. *Queens County Water Co.*, 123 N. Y. 91; *Farmers' &c. Trust Co.* v. *New York &c. R. Co.*, 150 N. Y. 410.

Complainants desiring institution of a law-suit were not required by Rule 94 to ask for election of a new board of directors.

When this suit was instituted the Delaware Company controlled the Susquehanna stock vote.

Stockholders whose corporation is in adverse control are entitled to protection by injunction.

Complainants are entitled to maintain this bill by reason of their direct relations to both defendant corporations. Rule 94 does not apply to this case.

The Delaware Company has not only agreed with the lessor corporation by covenant in the lease to pay rent for the Susquehanna property, but by the guarantee on stock certificates has also agreed with individual stockholders that payment of this rent shall be made by dividing the corporate income as provided in the lease.

The Delaware Company has, therefore, in respect to corporate rights of the Susquehanna Company, entered into privity of contract with every Susquehanna stockholder, concerning division of the entire rent. *Hawes* v. *Oakland*, 104 U. S. 450.

Stockholders' suits cannot be at law, for the guarantees are part of the entire covenant to pay the entire rent arising from a single demise of corporate property.

An action to divide corporate income among stockholders must be brought in equity,—otherwise the lessee's right of offset would be defeated and unequal division of income made among stockholders. *Barr* v. *New York &c. Co.*, 96 N. Y. 444.

MR. JUSTICE MCKENNA delivered the opinion of the court.

The certificate of the court is as follows:

"This cause comes here upon appeal from a final decree of the Circuit Court, Southern District of New York, which directs that the defendant Delaware and Hudson Company (hereinafter called the Delaware Company) pay to the defendant the Albany and Susquehanna Railroad Company (hereinafter called the Susquehanna Company) the amount of $1,107,923.24.

"The case was fully argued and submitted on briefs. It thereupon developed that there was a question presented whether the bill could be maintained under the ninety-fourth equity rule. That question is a preliminary one, it has been held to be jurisdictional in character (*City of Chicago* v. *Mills*, 204 U. S. 321; *Doctor* v. *Harrington*, 196 U. S. 579), and this court desires the instruction of the Supreme Court for its proper decision.

Statement of Facts.

"The facts upon which the question arises are as follows:

"The defendant corporations are both citizens of the State of New York; the complainants are citizens of the States of Connecticut and Rhode Island. The bill was brought to obtain an accounting for various sums of money which it was alleged became due at intervals during a series of years from the Delaware Company to the Susquehanna Company as rental or in the nature of rental under a lease made in 1870. For the convenience of all a copy of the pleadings is hereto annexed, marked Exhibit 'A,' which may be referred to for a more detailed statement of the cause of action. The bill does not 'set forth with particularity the efforts of the plaintiffs to secure such action as they desire on the part of the managing directors or trustees.' Nor did the proofs show any such efforts. Nor does the bill set forth any efforts to secure 'such action on the part of the shareholders.' Nor did the proofs show any such efforts. Nor did the bill set forth, or the proofs show, 'the

causes of their failure to obtain such action' otherwise than is hereinafter disclosed.

"The complaint was filed on June 12, 1906. The Susquehanna Company was organized under the act of April 2, 1850, which provides that 'there shall be a board of thirteen directors . . . to manage its affairs,' and for many years before this suit was brought a majority of the board of directors of the Susquehanna Company consisted of persons who were officers, directors or employés of the Delaware Company. At the time this suit was instituted, the directors and officers of the Susquehanna Company, the dates of their election as such, and their relations to the Delaware Company with dates of election were as shown on the following statement:

Names of directors of Susquehanna Company and dates of election as directors and officers.	Position in Delaware and Hudson Company and dates.
Robert M. Olyphant, 1878	Director since 1872 President from 1884 to 1903 Chairman of the Board since 1903
George I. Wilber, 1883	Director since 1901
David Wilcox, 1894 (Vice President, May 9, 1906)	General counsel 1894 to 1903 Director since 1899 President since 1903
R. Suydam Grant, 1901	Director since 1886
Charles A. Peabody, 1902	Director since 1902
William S. Opdyke, 1903	General counsel since 1903 Director since 1905
Abel I. Culver, 1903	A Vice President since 1903
Charles A. Walker, 1892	Treasurer 1892
Robert Olyphant, 1887 (President since 1889)	Son of Robert M. Olyphant
William L. M. Phelps, 1873 (Secretary since 1870)	Secretary of the Albany and Susquehanna Company, elected by the board of directors.
Robert C. Pruyn, 1890	Nominees of the Delaware Company as stated in the Delaware Company's answer.
James H. Manning, 1890	

"Of these, Robert M. Olyphant, R. Suydam Grant, Charles A. Peabody, William S. Opdyke, Abel I. Culver and Robert C. Pruyn at the time this suit was begun did not own or hold in their own right any shares of stock in the Susquehanna Company, but shares of stock of that company owned by the Delaware Company were transferred to each of them on the books of the Susquehanna Company by the Delaware Company for the purpose of qualifying them as such directors. Charles A. Walker owned five shares of Susquehanna stock from 1901 to 1906; it does not appear that he owned any stock in the Susquehanna Company during the year 1906.

"So far as appears from anything shown in this record none of the directors or officers of the Delaware Company ever, before or after the bringing of this suit, treated the claim therein set forth otherwise than as one of doubtful validity the payment of which was to be resisted.

"On June 12, 1906, and for thirty years prior thereto, the capital stock of the Susquehanna Company had been fixed at and limited to 35,000 shares. Of this capital stock on June 12th, 1906, the Delaware Company owned 4500 shares and its directors or officers owned or controlled 4340 shares; the complainants owned 1312 shares and a so-called Protective Committee who from and after December, 1905, had been opposing the administration of the Delaware Company upon the questions involved in this bill controlled 6688 shares. The entire 35,000 shares were held by 546 different persons, of whom 423 owned 50 shares or less, and of whom 383 resided in the State of New York.

"An annual meeting of the Susquehanna Company was held subsequent to the beginning of this suit, on October 16, 1906. At that meeting the nominees of the protective committee were elected, receiving 15,501 ballots, the nominees of the former management receiving 15,441 ballots. About two weeks before such annual meeting the Susquehanna Company being then controlled by the directorate above named, filed a demurrer to the bill which is hereto annexed as Exhibit 'B.' Copies of

such demurrer were sent by stockholders opposed to the existing control to all stockholders and thereafter and before the meeting proxies for several thousand shares were received by the persons who voted for the nominees then elected.

Questions Certified.

"Upon the facts above set forth the questions of law concerning which this court desires the instruction of the Supreme Court are:

"First. 'Does the fact that before institution of this suit complainants made no demand for relief upon the Board of Directors of the Susquehanna Company prevent them from maintaining this bill?'

"Second. 'Does the fact that before institution of this suit complainants made no effort to obtain relief at a stockholders' meeting prevent them from maintaining this bill?'"

The questions in connection with the ninety-fourth equity rule present the issue in the case. The rule is as follows:

"94. Every bill brought by one or more stockholders in a corporation against the corporation and other parties founded upon the rights which may properly be asserted by the corporation must be verified by oath, and must contain an allegation that the complainant was a shareholder at the time of the transaction of which he complains, or that his share had devolved upon him since by operation of law, and that the suit is not a collusive one to confer on a court of the United States jurisdiction of a case of which it would not have otherwise cognizance. *It must also set forth with particularity the efforts of the plaintiff to secure such action as he desires on the part of the managing directors or trustees, and, if necessary, of the shareholders, and the causes of his failure to obtain such action.*"

Do the facts show a compliance with the rule, or rather that part of it which we have expressed in italics? The other parts of it are not involved.

It is the contention of appellant that the averments in the bill as exhibited in the certificate do not satisfy either the

language of the rule or its substance. The argument is that (1) a shareholder, as a condition of his suit, must show that he has exhausted all the means within his reach to obtain within the corporation itself the redress of his grievances, that his efforts must be earnest, not simulated, and this must be made apparent to the court; (2) his failure to apply to the managing body of the corporation will not, in the absence of fraud, be excused by the fact that such managing body are also officers, directors or employés of the corporation against which the suit is brought; (3) if the facts of this case excused from a preliminary demand upon the directors, the complainants were required to show "that they could not have secured appropriate action by an appeal to the stockholders of the Susquehanna Company." The appellees counter these contentions by asserting that (1) the case is not within the requirements of Rule 94. "The bill shows, under oath," it is said, "that the directors were hostile, and that demands upon them would be 'idle and nugatory.' . . ." (2) Complainants (appellees here) were not required to appeal to the stockholders of the Susquehanna Company because (*a*) the stockholders, under the charter of the company, could not grant relief; (*b*) even if such power existed, the stockholders "could not oust directors from office before expiration of their terms." And it is further contended that at the time the suit was instituted "the Delaware Company controlled the stock vote of the Susquehanna Company."

These opposing contentions present a not unusual case where the rule or principle of law is clear enough, but its application to a particular case is not so clear, and there is a contest of plausible constructions between which it is not always easy to decide. The purpose of Rule No. 94 hardly needs explanation. It is intended to secure the Federal courts from imposition upon their jurisdiction and recognizes the right of the corporate directory to corporate control; in other words, to make the corporation paramount, even when its rights are to be protected or sought through litigation. Cases in this court have

indicated such right. But the directory may be derelict and the interests of stockholders put in peril, and a case hence arises in which the right of protecting the corporation accrues to them. Rule 94 expresses primarily the conditions which must precede the exercise of such right, but emergencies may arise in which the antagonism between the directory and the corporate interest may be unmistakable, and the requirements of the rule may be dispensed with, or, it is more accurate to say, do not apply. There are cases which illustrate these contingencies. As a typical case of the first kind, that is, which enforces the doctrine that the rights of the corporation must be asserted through the corporation, *Hawes* v. *Oakland*, 104 U. S. 450, is cited. In that case *Dodge* v. *Woolsey*, 18 How. 331, was declared to be the leading case on the subject in this country, and, examining the latter case, it was said that it did not establish, nor was it intended to establish, a doctrine different in any material respect from that found in the other American cases and the English cases. And the doctrine was said to be that to enable a stockholder in a corporation to sustain in a court of equity a suit founded on a right of action existing in the corporation itself, and in which the corporation itself is the appropriate plaintiff, there must exist as a foundation for the suit some action or threatened action of the managing board of directors which is beyond their authority; a fraudulent transaction completed or contemplated which will result in serious injury to the corporation or stockholders; where the board of directors, or a majority of them, are acting for their own interest in a manner destructive of the corporation itself or of the rights of other stockholders; or where a majority of the stockholders themselves are oppressively and illegally pursuing a course inimical to the corporation or to the rights of the other stockholders. The court expressed the possibility that other cases might arise, but said "the foregoing may be regarded as an outline of the principles which govern this class of cases."

Determined by the principles enumerated, the court affirmed a decree sustaining a demurrer to a bill by a stockholder of the

Contra Costa Waterworks Company, filed in behalf of himself and other stockholders against the company, its directors and the city of Oakland, to enjoin the city from taking, and the directors from permitting it to take, water from the works of the company without compensation. The bill alleged a request of the directors to take proceedings, and that they declined to do so. The bill also alleged injury to the corporation, diminution of dividends of the complainant and other stockholders, and a decrease of the value of their stock. Appellant adduces, as repeating and illustrating the doctrine of *Hawes* v. *Oakland*, the following cases: *Dimpfell* v. *Ohio & Mississippi Ry. Co.*, 110 U. S. 209; *Quincy* v. *Steel*, 120 U. S. 241; *Taylor* v. *Holmes*, 127 U. S. 489; *Corbus* v. *Alaska Treadwell Gold Mining Co.*, 187 U. S. 455. The latter case is quoted by appellant as putting unmistakable emphasis on Rule 94, and that the facts of the case at bar do not satisfy its requirements. The object of the suit was to enjoin the board of directors of the corporation from paying a license tax levied upon the corporation under the provisions of an act of Congress. Corbus, the complainant in the suit, was a stockholder of the corporation, and alleged, as the reason of the suit by him, that he was unable to request the directors of the company to refuse to pay the tax or apply for the license required by reason of their great distance from him, but that he had made such request of the officers of the company residing in Alaska, and that they had refused to comply with the request. Of this allegation the court said that it showed no compliance with Rule 94, and that complainant simply relied on the distance of the directors from where he resided as an excuse for not applying to them. "We are of opinion," it was said, "that the excuse is not sufficient. He should at least have shown some effort. If he had made an effort and obtained no satisfactory result, either by reason of the distance of the directors or by their dilatoriness or unwillingness to act, a different case would have been presented, but to do nothing is not sufficient."

A case sustaining the second proposition which we have

mentioned, to wit, where the circumstances take the cases out of the rule, is *Doctor* v. *Harrington*, 196 U. S. 579. The suit was brought by Doctor and others as stockholders of a corporation called the Sal Sayles Company to set aside a judgment obtained by the Harringtons against that company. The bill alleged that the suit was not collusive; that complainants were unable to obtain redress from the company or "at the hands" of its stockholders. It further alleged that the board of directors of the corporation was "under the absolute control and domination of the defendant, John J. Harrington, and that said Harrington, by reason of having the possession of a majority of the capital stock of said corporation," likewise controlled "the action of the stockholders." It was further alleged that he refused to give any information with regard thereto, and declined to redress the wrongs of which complaint was made, or give complainants any opportunity to lay before the board of directors or the stockholders of the company the facts set forth.

It will be observed, therefore, that there was no compliance with the requirements of Rule 94, as expressed in its letter. The efforts that were made to secure the action of the managing directors or trustees were not "set forth with particularity." Nothing was alleged but the domination of John J. Harrington and his control of the directors. What he did, in what way he exerted control, was not alleged. In other words, the bill seemed to show a case not of compliance with the requirements of Rule 94, but circumstances which excused from such compliance.

Coming to consider the effect of those allegations, we said that Rule 94 contemplates that there may be, and provides for, a suit by the stockholder in a corporation founded on rights which may be properly asserted by the corporation. And we further said that "the ultimate interest of the corporation made defendant may be the same as that of the stockholder made plaintiff, but the corporation may be under a control antagonistic to him and made to act in any way detrimental to his interest. In other words, his interests and the interests of the

corporation may be subservient to some illegal purpose." And we decided that these principles were satisfied by the allegations of the bill and that such antagonism existed between the complainants in the suit and the directors of the corporation that they would "suffer irremediable loss if not permitted to sue." In other words, the complainants were in such a situation by reason of the power which Harrington possessed over those who managed the corporation—directors and stockholders—that appeals to them for action would have been futile. Prior cases were considered, including *Dodge* v. *Woolsey* and *Hawes* v. *Oakland*, and the conclusion reached was pronounced to be in accordance with their doctrine.

Do the facts in the case at bar present the same situation that was passed on in *Doctor* v. *Harrington?* The certificate shows the following facts: The complaint was filed June 12, 1906. The suit was brought to obtain an accounting for various sums of money, which it was alleged became due at intervals during a series of years from the Delaware Company to the Susquehanna Company as rental, or in the nature of rental, under a lease made in 1870. The Susquehanna Company was organized in 1850, and, under the law, its board of directors consisted of thirteen members, a majority of whom for many years before this suit was brought were also "officers, directors or employés of the Delaware Company." Indeed, they served as its president, vice president, treasurer, secretary, directors and general counsel—officers of dominating influence, it must be said. It appears that certain of the persons occupying those offices did not at the time the suit was brought own or hold in their own right any shares of stock in the Susquehanna Company, but shares of stock in that company owned by the Delaware Company were transferred to each of them on the books of the former company by the latter company for the purpose of qualifying them as directors. The number of shares of the capital stock of the Susquehanna Company and how held or owned, and the attitude of the owners thereof to the Delaware Company, appear in the certificate and need not be repeated.

The certificate recites the following: "So far as appears from anything shown in the record none of the directors or officers of the Delaware Company ever before or after the bringing of this suit treated the claim therein set forth otherwise than as one of doubtful validity, the payment of which was to be resisted."

The situation was unique. The company whose interest it was to assert the right to payment and to demand it was under the control or could be influenced by the company whose interest it was to deny indebtedness and resist payment. And though there are allegations in the bill of contrary import, the good faith of the directors need not be questioned. They might notwithstanding be firm in their views—firm to resist appeals against them. Their views seemed to persist through many years. At any rate, a situation was presented fully as formidable to the interest of stockholders in the Susquehanna Company as that presented in the *Harrington case*. And it may be well doubted whether, if the directors of the Susquehanna Company, so being directors of the Delaware Company, and who either from an apathy that endured through many years could discern no right in that company to assert or through conviction of the absence of right, were not the best agents to begin or conduct a litigation of such right. It was certainly natural enough that a stockholder should seek more earnest representatives and consider that the directors "occupied," to use the language of *Dodge* v. *Woolsey*, "antagonistic grounds in respect to the controversy" as to him. The attitude of the directors need not be sinister. It may be sincere. It was so in *Chicago* v. *Mills*, 204 U. S. 321, and *Ex parte Young*, 209 U. S. 123, and other cases. In this case it was certainly determined. It continued until after this suit was brought. Both the Delaware Company and the Susquehanna Company, then under "the administration of the Delaware Company," to quote from the Circuit Court of Appeals, demurred to the bill.

But it is contended that efforts should have been made and alleged to move the corporation to action through a stock-

holders' meeting. In this contention there is again similarity to the *Harrington case*. It was there alleged that Harrington controlled the action of the stockholders "by reason of having possession of a majority" of the capital stock of the corporation. The control in the case at bar, therefore, may not have been as direct as in *Doctor* v. *Harrington*, but it was practically efficient. The stock of the Susquehanna Company consisted of 35,000 shares, of which the Delaware Company and its directors and officers held 8,840. The complainant and a so-called protective committee, a committee which the certificate states "from and after December, 1905, had been opposing the administration of the Delaware Company upon the questions involved in this bill," controlled 8,000 shares. The certificate also states that the "entire 35,000 shares were held by 546 different persons, of whom 423 owned 50 shares or less, and of whom 383 resided in New York." The proposition then is, that notwithstanding the power of 8,840 shares, held by the managers of both corporations, against 8,000 held by complainants and the protective committee, complainants were required by Rule 94 to engage and organize all other stockholders, or enough of them to direct or change the corporate management; in other words, struggle for the control of the corporation with an adverse board of directors. And such struggle, appellant contends, "could not be regarded as presumptively futile," as there would be an appeal to "the self-interest of the remaining stockholders," and, it is pointed out, that the certificate recites that control through the stockholders was subsequently obtained. But it was obtained after the suit was begun and the antagonism of the directors was more clearly exhibited. The circumstances of this case preclude therefore an acceptance of appellant's proposition. Rule 94 is intended to have practical operation, and to have that it must, as to its requirements, be given such play as to fit the conditions of different cases. Therefore, considering that this case by reason of its facts falls within the principle of *Doctor* v. *Harrington*, we do not review the cases cited by appellee, wherein, it is contended, suits were

justified by demand on the directors alone, nor consider whether stockholders have the power to compel directors to institute suits to which the directors are opposed.

We answer both questions certified in the negative.